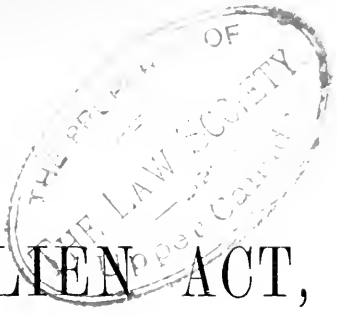

THE

MECHANICS' LIEN ACT,

BEING THE

REVISED STATUTE OF ONTARIO (1887),

CHAPTER 126.

WITH

ANNOTATIONS, AND ADDITIONAL FORMS OF PROCEEDINGS THEREUNDER,

BY

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ABBREVIATIONS USED IN THIS WORK.

Abb. Pr.	Abbott's Practice Reports, New York.
Abb. Pr. N. S. N. Y.	Abbott's Practice Reports, New York, New Series.
App. Cas.	English Law Reports, Appeal Cases.
App. R.	Ontario Appeal Reports.
Atk.	Atkyns' Reports.
B. & Ald.	Barnewall & Alderson's Reports.
B. & S.	Best & Smith's Reports.
Barb.	Barbour's Reports, N. Y.
Bing. N. C.	Bingham's New Cases.
C. L. J.	Canada Law Journal.
C. L. T.	Canada Law Times.
C. P.	Upper Canada, or Ontario, Common Pleas Reports.
C. R.	Consolidated Rules of Supreme Court of Judicature for Ontario.
Cab. & Ellis	Cababe & Ellis' Reports.
Cal.	California Reports.
Cameron's Opinions	Opinions of the late John Hilyard Cameron, Q.C.
Cass. Dig.	Cassels' Digest of the Reports of the Supreme Court of Canada.
Chy. Ch. R.	Chancery Chambers Reports (Ontario).
Chy. D.	English Law Reports, Chancery Division.
Col.	Colorado Reports.
Conn.	Connecticut Reports.
D. B.	Decree Book, Court of Chancery, Ontario.
D. G. & Sm.	DeGex & Smale's Reports.
E. & B.	Ellis & Blackburn's Reports.
E. D. Smith (N. Y.)	E. D. Smith's New York Reports.
Ex.	Exchequer Reports (English).

Gr.	Grant's Chancery Reports, Ontario.
Gratt.	Grattan's Reports.
How. Pr.	Howard's Practice Reports (N. Y.).
Ill.	Illinois Reports.
Ill. App.	Illinois Appeal Reports.
J. B.	Judgment Book, Chancery Division, Ontario.
Kan.	Kansas Reports.
L. R. Chy.	English Law Reports, Chancery Appeals.
L. R. C. P. D.	English Law Reports, Common Pleas Division.
L. R. Ex.	Law Reports, Exchequer.
L. R. Chy.	Law Reports, Chancery.
L. T.	Law Times, Journal (English).
L. T. N. S.	English Law Times Reports, New Series.
M. & W.	Meeson & Welsby s Reports.
Man. R.	Manitoba Reports.
Mass.	Massachusetts Reports.
Md.	Maryland Reports.
Mich.	Michigan Reports.
Minn.	Minnesota Reports.
Miss.	Mississippi Reports.
Miss. App.	Missouri Appeal Reports.
Mo.	Missouri Reports.
N. J. L.	New Jersey Law Reports.
N. W. R.	North-Western Reporter (N. S.).
N. Y.	New York Reports.
O. R.	Ontario Reports.
P. R.	Practice Reports, Ontario.
Penn.	Pennsylvania Reports.
Penn. St.	Pennsylvania State Reports.
Phila.	Philadelphia Reports.
Phillips.	Phillips on Mechanics' Liens.
Q. B.	Ontario Queen's Bench Reports.
Q. B. D.	English Law Reports, Queen's Bench Division.

Rep. Ch.	English Reports in Chancery.
R. S. O.	Revised Statutes of Ontario, 1887.
R. S. O. 1877.	Revised Statutes of Ontario, 1877.
S. C.	Same case.
S. C. R.	Reports of Supreme Court of Canada.
Sup. C. N. Y. Hun . .	Supreme Court of New York Reports, Hun.
Taunt.	Taunton's Reports.
U. C. L. J.	Upper Canada Law Journal, Old Series.
U. C. Q. B.	Upper Canada Queen's Bench Reports.
U. S.	United States Reports.
Wall.	Wallace's Reports, Supreme Court, United States.
Watts & Serg.	Watts & Sergeant's Reports, Supreme Court, Pennsylvania.
Wis.	Wisconsin Reports.

THE MECHANICS' LIEN ACT,

BEING

THE REVISED STATUTE OF ONTARIO, 1887,

CHAPTER 126.

An Act respecting Liens of Mechanics and others (*a*).

SHORT TITLE, s. 1.
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EXPIRY OF LIEN, ss. 22, 24.
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EXEMPTION OF MATERIALS FROM EXECUTION, s. 31.
SALE OF CHATTELS BY PERSONS ENTITLED TO LIEN, s. 32.

(*a*) This Act came into force on 31st December, 1887. See *Ontario Gazette*, 1888, p. 4; R. S. O. p. lvii.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Section 1. Short title.

1. This Act may be cited as "*The Mechanics' Lien Act.*" R. S. O. 1877, c. 120, s. 1.

The lien of mechanics on lands or buildings, for labour or materials expended thereon, is a purely statutory right; no such lien existed at Common Law.

Previous legislation.

The first *Mechanics' Lien Act* passed in this Province was 36 Vict. c. 27 (1873). It restricted the right of lien on the land, to those who had contracted directly with the owner of the land; but it gave to sub-contractors the right of serving notice of their claims upon the owner, and upon such notice being served, authorized the owner to pay their claims, out of any money due by him to the contractor primarily liable therefor. This Act was subsequently amended in 1874, by 38 Vict. c. 20, which gave sub-contractors also the right of lien on the land. These Acts were subsequently consolidated by the R. S. O. (1877), c. 120. After this consolidation the Consolidated Act was further amended by 45 Vict. c. 15, which gave certain extraordinary rights of lien to wage earners, in respect of thirty days' wages: and additional amendments were made by 47 Vict. c. 18, and 50 Vict. c. 20.

The principal changes effected by these latter Acts were the avoiding of all agreements to prevent the attaching of mechanics' liens, except as between the actual parties to such agreements; and providing that liens for thirty days' wages or less should have the same priority "before as after" *(sic)* the registration of the lien—the intention of the legislature no doubt was to give such liens the same priority "after as they had before" registration, and this error in the wording

of the original statute has been corrected in this revision (see *post, section* 20, *s.s.* 3). The other amendments related to the procedure for enforcing, and discharging liens. Sections 1, 2.

The present Act is a consolidation of all these statutes.

It has been held that when a lien attaches, the statute, being remedial, is to be liberally construed; but on the question whether the lien attaches a different rule should obtain, because, liens being in derogation of the Common Law, the Court should not extend the statute beyond the cases specially provided for: *Trask* v. *Searle*, 121, Mass. 229, and see *Flagstaff Silver Mining Co. of Utah* v. *Cullins*, 104 U.S. 176. Construction of Act.

2. Where the following words occur in this Act, or in the schedules thereto, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:— Interpretation.

1. "Contractor" (*a*) shall mean a person contracting with or employed directly by the owner for the doing of work or placing or furnishing of machinery or materials for any of the purposes mentioned in this Act; "Contractor."

2. "Sub-contractor" (*b*) shall mean a person not contracting with or employed directly by the owner for the purposes aforesaid, but contracting with or employed by the "Contractor," or under him by another "Sub-contractor;" "Sub-contractor."

3. "Owner" (*c*) shall extend to and include a person having any estate or interest in the lands upon or in respect of which the work is done, or "Owner."

Section 2.

materials or machinery are placed or furnished, at whose request and upon whose credit or on whose behalf or with whose privity or consent (*d*) or for whose direct benefit any such work is done, or materials or machinery placed or furnished, and all persons claiming under him (*e*), whose rights are acquired after the work in respect of which the lien is claimed is commenced, or the materials or the machinery furnished have been commenced to be furnished. R. S. O. 1877, c. 120, s. 2.

"Contractor," definition of.

(*a*) "*Contractor.*" The primary meaning of "contractor" is any one who contracts. In this Act, however, and in the annotations upon it, the term is restricted to those persons only, who contract directly with the "owner." Every person contracting directly with the "owner" is a "contractor" under the Act. Where, therefore, the "owner" contracts with several different persons to construct different parts of the building, each person so contracted with is a "contractor," and each "contractor" would appear to be a lien-holder of the "same class," (see *Bunting* v. *Bell*, 23 Gr. 584).

"Sub-contractor," definition of.

(*b*) "*Sub-contractor.*" By the definition here given of a "sub-contractor" it would seem to include all sub-contractors, in however remote a degree they may stand from the original "contractor." For example, if A contracts with the "owner" to build a house, and then B contracts with A to do the painting and papering, B is a "sub-contractor," and as this section in effect declares that any person employed by a "sub-contractor" is himself a "sub-contractor," it follows that if C contract with B to do part of the painting, and D contract with B to do the papering, and E contract with C to furnish the paint and F contract with D to furnish the paper,

B, C, D, E, and F are all sub-contractors under the Act and as such entitled to liens. Section 2.

(c) "*Owner.*" It is important to bear in mind that the lien given by this Act to "contractors" and "sub-contractors" is to attach upon the estate and interest, legal and equitable, of the "owner" in the building, erection, or mine, upon, or in respect of which, the work is done, or the materials or machinery placed or furnished, (see *section* 5). This section provides, that the word "owner" is to extend to, and include persons having "any estate or interest in the lands upon or in respect of which the work is done, or materials or machinery are placed or furnished, *at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work is done, etc.*" The word "owner," therefore, includes all persons, however small their interest in the land may be, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit, any work is done, etc. But persons contracting for work or materials, can only bind their own estates and interests, and cannot bind the estates and interests of other persons then interested in the land. Thus, a landlord's interest is not bound by contracts made with his tenant to which the landlord is no party, even though the latter have knowledge that the work is being done, or material being furnished, on the land, and though in certain contingencies he may, and in fact does, become entitled to the benefit thereof: *Graham* v. *Williams*, 9 O. R. 458; *Cornell* v. *Barney*, 33 Sup. C. N.Y., Hun. 134. And a tenant at sufferance is not agent for, nor can he bind the owner, by his contracts: *Proctor* v. *Towes*, 115 Ill. 138. Where it is sought to charge the landlord's estate with liens for work or materials contracted for by his tenant, the consent in writing of the landlord must be obtained (see *section* 5, s.s. 2), *Graham* v. *Williams*, 9 O. R. 458. Neither is the dower of a wife bound by a contract made with her husband: *Shaeffer* v. *Weed*, 8

"Owner," definition of.

Persons contracting, can only bind their own interests in the land.

Tenant at sufferance, is not agent of owner of fee.

Dowress not bound by con-

Section 2.

tract of her husband.

Ill. 513.; *Gore* v. *Cather*, 23 Ill. 634; *Phillips*, s. 195. But where the husband acquires the land after the lien has attached, the lien will have priority over the dower (*Ib.*).

Contract under which lien arises must be binding on "owner."

In order that a lien may attach under this Act it is necessary that the original contract, by virtue of which it is claimed to arise, be one that is binding on the "owner" whose interest is sought to be charged. It is not necessary that the contract of the lien-holder himself should be made directly with the "owner," otherwise all sub-contractors would be excluded from the benefit of a lien, but generally speaking it is necessary that the person legally liable to the contractor under whom a sub-contractor directly or indirectly claims, shall have some estate or interest in the land on which the lien is claimed.

Contract with person having no interest in land.

Work done or materials furnished at the request of a person having no interest in the land, will confer no lien upon the land. Thus when, in fulfilment of a policy, a house is rebuilt by an insurance company upon the land of the insured, no lien for the work or materials will under such circumstances attach upon the land: *Phillips*, s. 82.

Contract with minor, or lunatic.

Where the contract, by virtue of which the lien is claimed, is made with an "owner" who is a minor, or lunatic, no lien could be enforced under the Act by the contractor or any sub-contractor, because minors and lunatics are incapable of binding either themselves, or their lands, by contracts for the erection of buildings, or improvements on their property. And it would seem that a contract made with a guardian of a minor, without the sanction of some competent court, for the erection of a building on the minor's land, would not give any right to a lien under this Act: *McCarthy* v. *Carter*, 49 Ill. 53; *Copley* v. *O'Niel*, 57 Barb. 299; and see *Collins* v. *Martin*, 41 U. C. Q. B. 602; *Phillips*, ss. 108-111.

Contract with husband, to

Where the owner of land is a married woman, as a general rule she must be bound by any contract, express or implied,

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under which any buildings or improvements may be erected, or made upon her land, otherwise no lien will attach upon her interest in the land for the price. It is not sufficient that the work has been done, or the materials have been furnished, at her husband's request, unless it can be established that the husband acted as the wife's agent ; the relationship of husband and wife, does not of itself raise any presumption that the husband acted as his wife's agent. Where a husband, on his own responsibility, procured a building to be erected on his wife's land, without her consent or concurrence, it was held that she was not liable for the price : *Wagner* v. *Jefferson*, 37 U. C. Q. B. 551 ; *Esslinger* v. *Huebner*, 22 Wis. 602 ; *Newcomb* v. *Andrews*, 41 Mich. 518 ; *Woodruff Iron Works* v. *Adams*, 39 Id. 233 ; *Wright* v. *Hood*, 5 N. W. R. 488 ; *Wendt* v. *Martin*, 89 Ill. 139 ; *Geary* v. *Hennessy*, 9 Ill. App. 17 ; *Little* v. *Vredenburgh*, 16 Ill. App. 189. To this general rule, however, liens for wages for thirty days or less are an exception, and attach upon the lands of a married woman upon or in respect of which the labour for which the wages are payable has been performed, where such work has been done at the instance of her husband, even though she may not have been a party to the contract, provided they are duly registered as provided by section 20, (see *section* 6, s.s. 2).

do work on wife's land, effect of.

Liens for wages.

A contract made with a trustee having power to build will bind the trust estate, (see *Taylor* v. *Gilsdorff*, 74 Ill. 354).

Contract with trustee.

(*d*) "*With whose privity or consent.*" Mere knowledge of the existence of the contract, or of the performance of the work, or supplying of materials, is not sufficient : see *Graham* v. *Williams*, 8 O. R. 478 ; 9 O. R. 458. But an owner standing by, and inducing credit to be given to another, upon the representation that such other person is the owner, may be estopped in equity from afterwards setting up his title adversely to the claim of a lien-holder, whose lien has been

Privity or consent of "owner."

Estoppel of "owner."

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acquired under such circumstances : *Higgins* v. *Ferguson*, 14 Ill. 269 ; *Donaldson* v. *Holmes*, 23 Ill. 85.

Persons claiming under "owner," how far bound by liens.

(*e*) "*And all persons claiming under him.*" These words, when taken in connection with section 5, would seem to indicate that the intention of the Act was to prevent the claim of a lien-holder from being defeated either by the death of the "owner" with whom the lien-holder, directly or indirectly, contracts, or by his transferring his interest in the property to another after the lien has attached ; and this view was adopted by the court in *Makins* v. *Robinson*, 6 O. R. 1, and see *Hilton* v. *Merrill*, 106 Mass. 528 ; *Smith* v. *Norris*, 120 Mass. 58 ; *Gale* v. *Blaikie*, 126 Mass. 274 ; *Amidon* v. *Benjamin*, Ib. 276 ; *Ettridge* v. *Bassett*, 136 Mass. 314 ; but where the "owner" with whom the lien-holder, directly or indirectly contracts, has subsequently to the lien attaching a mere momentary seizin, as where the property is conveyed to him, and he contemporaneously mortgages it back to his grantor, the lien would not, it seems, attach upon the estate of the mortgagee (see *post*, *section* 5, note *b*): but subject to this exception, the intention of the Act seems to have been that all persons claiming under the "owner" with whom the contract is directly or indirectly made, whose rights accrue after the work or materials, in respect of which the lien is claimed, have been commenced to be done, or finished, should take subject to the lien, provided it be duly enforced as provided by the Act (see *sections* 22, 23, 24). But it has been held in the United States, that in order that a lien may prevail against a subsequent mortgagee without notice, it is necessary that the contract should be precise and definite, and not subject to be affected, modified, or changed at the will of one of the parties : *Manchester* v. *Searle*, 121 Mass. 418.

Instantaneous seizure.

Effect of prior registration.

But in the present state of the authorities in Ontario it would seem that a subsequent grantee or mortgagee of the "owner" may acquire priority over the lien-holder, by prior

registration : see *Douglas* v. *Chamberlain*, 25 Gr. 289, 290 ; *Hynes* v. *Smith*, 27 Gr. 150 ; *McVean* v. *Tiffin*, 13 App. R. 1 ; *Re Craig* 3 C. L. T. 501 ; *Reinhart* v. *Shutt*, 15 O. R. . These cases proceed on the assumption that *The Registry Act* applies to mechanics' liens, although section 19 of this Act expressly declares that it is not to apply to them, except as by this Act is provided, (see *sections* 16, 20, 23). It has been argued therefore that these cases do not correctly interpret the Statute, (see 22 C. L. J. 355, 356). Section 2.

Assuming the reasons upon which these cases are founded to be correct, it has been suggested (see *Reinhart* v. *Shutt*, 15 O. R.) that they in effect overrule the decision of Ferguson, J., in *Makins* v. *Robinson*, *supra*. It may, however, be well to observe that the facts in the latter case were essentially different from those in *Hynes* v. *Smith*, and *McVean* v. *Tiffin*. In the latter cases, what was sought to be done, was to add a subsequent mortgagee as a party in the Master's office after the time limited by the Act for bringing a suit to enforce the lien had expired ; and inasmuch as the suit is not commenced as against parties added in the Master's office until such parties are actually added ; see *Bank of Montreal* v. *Haffner*, 29 Gr 319 ; 10 App. R. 592 ; S.C. *sub. nom. Bank of Montreal* v. *Worswick*, Cass. Dig. 289 ; *McGraw* v. *Bayard*, 96 Ill. 146 ; *Gardner* v. *Watson*, 18 Ill. App. 386 ; *Lamb* v. *Campbell*, 19 Ill. App. 272 ; the plaintiff's right as against such subsequent mortgagee had in fact expired under sections 22, 23 ; whereas in *Makins* v. *Robinson* the subsequent transferee was an original party defendant, and the action was commenced against him in due time. While, therefore, the decisions arrived at in *Hynes* v. *Smith* and *McVean* v. *Tiffin* appear to have been quite correct on the facts presented in those cases, it is possible that the reasons assigned for those decisions may hereafter be found to need modification. Certainly they seem somewhat difficult to reconcile with section 2 s.s. 3, *Makins* v. *Robinson*, how far reconcilable with *McVean* v. *Tiffin*.

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which declares that the term "owner" is to include all persons claiming under the person with whom the contract is made, "*whose rights are acquired after the work in respect of which the lien is claimed is commenced, &c.,*" and section 5, which declares that the lien "shall attach upon the estate and interest of the *owner as defined by this Act,*" and section 19, which declares "that except as herein otherwise provided *The Registry Act* shall not apply to any lien arising under this Act."

Subsequent legislation, effect of, as regards *McVean* v. *Tiffin.*

It has been suggested (*Reinhart* v. *Shutt, supra*) that the Legislature has given a quasi-legislative sanction to the interpretation adopted by the courts in *Hynes* v. *Smith* and *McVean* v. *Tiffin* by the amendment introduced by 50 Vict. c. 20, s. 1, in favour of liens for wages (see *section* 20 s.s. 3, *post*). This provision, as now incorporated in the Revised Statute, expressly provides that liens for thirty days' wages "shall have the same priority for all purposes after as before registration"; but it is open to question whether that provision does any more than declare what was previously, and still is, the law as to all liens. That section seems to imply that previous to its passage a lien's priority existing before registration, might be lost by its subsequent registration. If *McVean* v. *Tiffin* be correct the priority of the lien is not lost merely by its registration, but by reason of the previous registration of some conflicting right, and this prior registration of a conflicting right will defeat the lien, as well before, as after its registration, if *McVean* v. *Tiffin* be a correct interpretation of the Statute. Assuming *The Registry Act* to apply to mechanics' liens, as held by the court in *McVean* v. *Tiffin, supra*, it would seem that prior registration will not give priority over mechanics' liens of which the person claiming under the prior registered instrument had actual notice, before registration of the instrument under which he claims, (see *Rose* v. *Peterkin*, 13 S. C. R. 677; *Wanty* v. *Robins*, 15 O. R.).

Actual notice of unregistered lien, effect of.

Where a mortgage is given to secure advances to be applied in the erection of a building upon land, and all the money is advanced before any of the work is done by persons who subsequently register liens, the interest of the mortgagee is not bound by such liens, (see *Cameron's Opinions*, p. 184) except as provided by section 5, s.s. 3. Sections 2, 3. Mortgage to secure future advances.

It has been held, that when a mortgage was given to secure future advances, and was duly registered; and advances were made after a right of lien had been acquired under the Act, but before registration of the lien, and without any actual knowledge of the lien by the mortgagee, that the lien-holder was not entitled to priority over the claim of the mortgagee in respect of such subsequent advances: *Richards* v. *Chamberlain*, 25 Gr. 402; and see *Brooks* v. *Lester*, 36 Md. 65; *Robinson* v. *Williams*, 22 N. Y. 380; *Moroney's Appeal* 24 Penn. 372; *Martsolf* v. *Barnwell*, 15 Kan. 612; *Iaege* v. *Bossieux*, 15 Gratt. 83. Advances after lien attaches, effect of.

3. No agreement (*a*) shall be held to deprive any one otherwise entitled to a lien under this Act, and not a party to the agreement (*b*), of the benefit of the lien, but the lien shall attach, notwithstanding such agreement. 47 V. c. 18, s. 1, *part*. Person not deprived of lien by agreement, unless a party thereto.

(*a*) "*No agreement.*" The object of this section is to prevent contractors, or sub-contractors, from entering into agreements which shall deprive their sub-contractors of the right of lien. Under this section a contractor might contract with the owner not to register, or claim, any mechanics' lien, but, notwithstanding such an agreement, any person who might enter into a sub-contract with such contractor to perform any part of the contract, would be entitled to claim a lien. Although no agreement can deprive any but the party to it of the right to a lien, yet it is possible that agreements might Agreement to waive lien, effect of.

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be made putting an end to the contract, or forfeiting the price payable thereunder, if any mechanics' lien should be registered by the contractor, or any sub-contractor under him, and inasmuch as the amount for which a sub-contractor is entitled to a lien cannot exceed what is due by the owner to the contractor under whom such sub-contractor directly or indirectly claims (see *post*, *sections* 8, 10), it is possible that the lien of the latter might be defeated notwithstanding this section.

Agreement to waive lien does not bind persons not parties.

(*b*) "*Not a party to the agreement.*" It would seem probable that all persons actually representing the estate of a person who has contracted to waive a right to a mechanics' lien, are bound by such an agreement though not actual parties to it, *e.g.*, the personal representative of a deceased contractor, or sub-contractor, who has made such an agreement, or his assignee would probably be held to be bound by the agreement, because such persons only take such right of lien if any, as the deceased person, or assignor, as the case may be, had at the time of his death, or assignment. At the same time it may be argued that but for the agreement they would have been entitled to a lien, and are therefore literally within the terms of this section. But for the purposes of the construction of this section, the personal representatives, or assignee, would probably be deemed in law to be parties to the agreement.

Mechanics and others to have liens for work done, etc.

4. Unless he signs an express agreement (*a*) to the contrary, every mechanic (*b*), machinist, builder, miner, labourer, contractor or other person (*c*) doing work (*d*) upon, or furnishing materials to be used (*e*) in, the construction, alteration or repair of any building or erection, or erecting, furnishing or placing machinery of any kind (*f*) in, upon or in connection with any building, erection or

mine (*g*), shall by virtue of being so employed (*h*) or furnishing, have a lien for the price of the work, machinery or materials, upon the building, erection or mine, and the lands occupied thereby or enjoyed therewith (*i*), limited in amount (*j*) to the sum justly due to the person entitled to the lien. R. S. O. 1877, c. 120, s. 3; 47 V. c. 18, s. 1, *part*. Section 4.

(*a*) "*Unless he signs an express agreement.*" It is obvious, from these words, that a parol agreement to waive the right of lien, is ineffectual. The agreement must be express, and not to be gathered by implication, and must be signed by the party entitled to the lien. An agreement binds only the party who signs it, and probably his representatives, (see *section* 3, note (*b*)), but not any sub-contractor. Prior to the 47 Vict. c. 18, s. 1, a "contractor" might, by his agreement, deprive all sub-contractors under him of the right of lien: *Forhan* v. *Lalonde*, 27 Gr. 600. Agreement to waive right to lien must be in writing, and express.

Persons entering into contracts as sub-contractors in the expectation of acquiring a lien under the Act, before engaging in the work, or furnishing materials, should nevertheless inquire of the "owner" at whose instance the work is being done, or materials furnished, whether there be any agreement between him and the "contractor" debarring the latter, or his sub-contractor, from claiming a lien. For although the right of sub-contractors to liens can only be barred by an express agreement between themselves and the "owner," yet their liens may perhaps be rendered fruitless by the "owner" stipulating with the "contractor," not only that the latter shall not be entitled to any lien, but also that in the event of any lien being claimed or registered by any sub-contractor under him, the money payable under the contract shall be forfeited; because the lien of a "sub-contractor" is, Rights of sub-contractors to lien, how far affected by agreements between "owner" and contractor.

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by section 8, limited to what is due by the "owner" to the "contractor," and if nothing be due, the "sub-contractor" can get no benefit from his lien: *Briggs* v. *Lee*, 27 Gr. 464; *Ferguson* v. *Burk*, 4 E. D. Smith (N. Y.) 760; *Allen* v. *Carman*, 1 E. D. Smith (N. Y.) 692; *Linn* v. *O'Hara*, 2 E. D. Smith (N. Y.) 560.

Minor, may acquire right of lien.

(*b*) "*Every mechanic.*" A minor, though unable to bind himself by contract, may nevertheless if he actually do work, or furnish materials, be entitled to a lien therefor: *Phillips*, s. 38. "Sub-contractors" as well as "contractors" are included. The extension of the right to register liens, to sub-contractors indefinitely, has been considered to be open to grave objections on the score of policy, both as regards the "owner" and the mechanic, (see *Phillips*, s. 60).

Architects, when entitled to lien.

(*c*) "*Or other person.*" An architect is entitled to a lien under this section, for drawing plans and specifications, and superintending the erection of a building: *Arnoldi* v. *Gouin*, 22 Gr. 314. But a distinction has been made in the United States where an architect merely draws plans and specifications, and does not superintend the erection; in such a case he has been held not to be entitled to a lien: *Raeder* v. *Bensberg*, 6 Miss. App. 445; *Phillips*, s. 158.

Extent of lien of contractor.

A contractor is entitled to a lien upon the interest of the "owner" in the land, not only for his own personal labour, but also for the labour of all employed by him, and also for all materials he has furnished, or procured to be furnished, for which he is liable. The fact that a lien is also given to the journeymen, or other labourers employed by the "contractor" is not inconsistent with the latter's right of lien; the effect of the "sub-contractors" enforcing their liens against the land, is merely to diminish *pro tanto* the lien of the contractor, (see *Phillips*, s. 40). A corporation doing work, or furnishing material, would be entitled to a lien

Corporation entitled to lien.

(see R. S. O. 1887, c. 1, s. 8, s.s. 13). An "owner" cannot have a lien under this Act against his own building for work done thereon, which he can enforce in competition with liens of third parties: *Phillips*, s. 39. Section 4. "Owner" cannot claim lien on his own land.

(*d*) "*Doing work.*" In order to entitle the mechanic, or material-man, to enforce a lien for his work or materials, the work must be done, and the materials must be furnished, substantially according to the original contract between the "owner" and the "contractor," whether the work be done, and the materials be furnished, by the "contractor" himself, or any "sub-contractor" under him. If there be any substantial variation from the contract, then there must be actual acceptance of the work and materials by the "owner," sufficient to create a new contract to pay for them, or he must have assented to the variation, or must himself have prevented the performance of the contract, or assented to its abandonment, (see *Clayton* v. *McConnell*, 14 O. R. 608). Performance of work requisite to right of lien. Variation from contract.

Where buildings are erected on the land of another, or repairs or alterations are made to such buildings, the possession of the land by the owner necessarily involves possession of the buildings in their existing state, and no inference can be drawn merely from such possession, or even from actual user of the buildings so erected, altered or repaired, of an acceptance of an imperfect performance of the contract for the erection, alteration, or repair thereof, so as to entitle the contractor to recover, either on the special contract or under the common counts a *quantum meruit*, (see *Munro* v. *Butt*, 8 E. & B. 738; *Ellis* v. *Hamlen*, 3 Taunt. 52; *Pattinson* v. *Luckley*, L. R. 10 Ex. 330; *Oldershaw* v. *Garner*, 38 U. C. Q. B. 37; *Gearing* v. *Nordheimer*, 40 U. C. Q. B. 21). Imperfect performance of contract.

There is no implied warranty, on the part of the "owner," that work can be done according to the plans and specifications furnished. The contractor who undertakes to perform work according to certain plans and specifications, in the No implied warranty that work can be performed according to specifications.

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absence of any stipulation to the contrary, does so at his own risk, and if the work cannot be completed in the manner specified, he cannot, nor does it seem possible that any sub-contractor under him can, recover against the "owner" for the work actually performed: *Thorn* v. *Mayor of London*, L. R. 9 Ex. 163; *S. C.* L. R. 10 Ex. 112. And where a contract was made to build and finish a house ready for occupation, and to deliver it so finished to the "owner," the delivery was not excused by the fact that, owing to a latent defect in the soil, the walls sunk and cracked, and the house became uninhabitable and dangerous, and had to be rebuilt: *Dermott* v. *Jones*, 2 Wall 1. But the express acceptance of the work by the owner waives non-compliance with specifications: *Harighorst* v. *Lindberg*, 67 Ill. 463. And a forfeiture for not completing the contract in time, is waived by payments made after the default, and urging the contractor to go on with the work: *Eyster* v. *Parrott*, 83 Ill. 517.

Express acceptance of work waives defect in performance.

Deviations as to matters not conditions precedent to right to recover.

But when the deviation from a contract arises in respect of some matter, the performance of which does not constitute a condition precedent to the right to recover, as, for instance, the completion of the work by a certain day, the value of the work may be recovered, and a lien therefor might in such a case be enforced: *Lucas* v. *Goodwin*, 3 Bing. N. C. 737; and see *Thompson* v. *Yates*, 28 How. Pr. (N. Y.), 142.

How far performance of contract between "owner" and "contractor" is essential to right of a sub-contractor to recover.

Under a statute which provided that "every building shall be subject to a lien for the payment of all debts contracted for work done, or materials furnished for or about the erection or construction of the same," it was held that it was sufficient to entitle a sub-contractor, furnishing materials and work, to a lien therefor, that his work was in accordance with the contract made by him with the contractor, notwithstanding that as between the "owner" and the "contractor" there was no performance of the contract, (*Rand* v. *Leeds*, 2 Phila. 160). It seems, however, unlikely that such a conclusion

could be arrived at under this Act in the face of section 8, which limits the lien of a sub-contractor to the amount payable to the contractor, or sub-contractor, through whom he claims. Under this provision any defence which the "owner" could set up against a claim by the "contractor" for the price, would seem equally available against any claim for a lien by any "sub-contractor" under him. Section 4.

When the procuring of an engineer's or architect's certificate is, by the terms of the contract with a "contractor," made a condition precedent to payment, the contractor, as a general rule, cannot recover the value of his work, either on the common counts, or under the contract, without first producing the certificate: *Sharpe* v. *San Paulo Ry. Co.*, L. R. 8 Chy. 597; *Tharsis Sulphur & C. Co.* v. *McElroy*, 3 App. Cas. 1040; *Lakin* v. *Nuttall*, 3 S. C. R. 685; *Jones* v. *The Queen*, 7 S. C. R. 570; *O'Brien* v. *The Queen*, 14 S. C. R. 529; *Coatsworth* v *City of Toronto*, 7 C. P. 490; 8 C. P. 364; *Ekins* v. *Bruce*, 30 U. C. Q. B. 48; *Ferguson* v. *Galt*, 23 C. P. 66. But, although the production of the certificate may be essential as a condition precedent to the recovery by the contractor, it is not necessarily so, where, the original contractor having failed in his contract, the owner agrees with a third party to go on and complete the work according to the original contract. In such a case, the completion of the work by such third party, so as morally to entitle him to a certificate, is all that need be shown: *Petrie* v. *Hunter*, 2 O. R. 233; 10 App. R. 127; *Lewis* v. *Hoare*, 44 L.T. N.S. 66. Production of engineer's or architect's certificate when a condition precedent to right to enforce lien.

So also, when a contractor is prevented from obtaining the certificate by the wrongful act of the "owner," he may recover on the common counts without the certificate: *Smith* v. *Gordon*, 30 C. P. 553. Non-production of certificate, when excused.

It is immaterial whether all the labour for which a lien is claimed is actually performed on the land, or in the workshop, or elsewhere, if it finally go into the work contracted Work need not be actually done on land, if it finally go

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into the work contracted for.

For what work lien may be claimed.

Grading.

Tearing down, and removing buildings.

Hauling.

Hoisting.

Fences.

Drains.

Furnaces.

Boiler.

Lightning rod.

for, (see *Wilson* v. *Sleeper*, 131 Mass. 177 ; *Dick* v. *Stevenson*, 70 L. T. 424 ; *Phillips*, s. 40). But the work or services must be immediately connected with the erection, (*Ib.* s. 155). There is no lien, for instance, for planing and sawing timber, without any agreement as to the use to be made thereof, although it is afterwards put into a building : *Bennett* v. *Shackford*, 93 Mass. 444. And it has been held, that filling in and grading the earth about buildings already erected, is not work for which a lien can be claimed : *Pratt* v. *Duncan*, 32 N. W. R. 709. Nor does a lien attach for labour in tearing down : *Holzhour* v. *Meer*, 59 Mo. 434, or removing a building : *Trask* v. *Searle*, 121 Mass. 229 ; *Stephens* v. *Holmes*, 64 Ill. 336 ; nor yet for merely hauling lumber and sand for a building, *Webster* v. *Real Est. Imp. Co.*, 140 Mass. 526, though if the sand or lumber be hauled by the person furnishing it, a lien could no doubt be claimed for the hauling as well as the price of the material : *Phillips*, s. 155 ; and in Pennsylvania it has been held that a lien may attach in favour of a teamster for hauling lumber for a building : *Hill* v. *Newman*, 38 Penn. 151, as also for labour done with derricks in hoisting materials : *Tizzard* v. *Hughes*, 3 Phila. 261. It has been doubted whether any lien would attach for work upon, and material for, fences (see *Hubbard* v. *Brown*, 90 Mass. 590 ; *Canisius* v. *Merrill*, 65 Ill. 67). But it would seem that a fence might properly come within the term "erection" in this section. On the other hand a drain-pipe had been held to be part of a house for which a lien may be claimed : *Hubbard* v. *Brown*, 90 Mass. 590.

When a lien is claimed for putting in a furnace and ranges, the question whether the transaction was the mere purchase and sale of a chattel, or the furnishing materials for the building, is said to be a mixed question of law and fact : *Turner* v. *Wentworth*, 119 Mass. 459 ; as to a boiler, see *Kelly* v. *Border City Mills*, 126 Mass 148. The erection of a

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lightning rod was held not to come under the head of building, altering, repairing or ornamenting a building, (see *Drew* v. *Mason*, 81 Ill. 498, and see *Bennett* v. *Shackford*, 93 Mass. 444).

How far material must be incorporated in building, to entitle material-man to lien.

(*e*) "*To be used.*" The question has frequently arisen in the United States whether it is essential to entitle a material-man to a lien, that the material in respect of which the lien is claimed should have been actually incorporated in the building erected on the land upon which the lien is claimed, (see *Phillips*, ss. 148-151).

It has been held under this Act that as between lien-holders *inter se* and for materials furnished to a "contractor" (and *a fortiori* to a sub-contractor), that there is no lien under the Act, until the materials have been affixed to the building or erection. But as between material-men and the "owner" of a building, the former have a lien for materials sold to the latter, to be used on the building, though not used, and others procured elsewhere. All a claimant in the latter case is required to show, is the fact that the materials were furnished for the purpose of being used in constructing, or repairing, the building, (see *Bunting* v. *Bell*, 23 Gr. 588). Questions may arise between different material-men, where both have sold on the credit of the building, the material of one having been used in its erection, and the other's not, but such questions would have to be adjusted on the principles of equity (see *Esslinger* v. *Huebner*, 22 Wis. 602). There is no lien for unsuitable materials furnished, but not used: *Hunter* v. *Blanchard*, 18 Ill. 318.

No lien for locomotive or portable machinery.

(*f*) "*Placing machinery of any kind.*" The word machinery, as here used, would only cover machines of a fixed or stationary character, and would not be construed to include locomotives and portable machines, (see *Phillips*, 178).

Lands not liable to lien.

(*g*) "*Any building, erection or mine.*" Notwithstanding the generality of these words, it has been held that the right

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of lien does not exist where the work has been done, or materials supplied upon property not liable to be sold in execution. Thus it has been held that there is no lien for work done on public school buildings: *Robb* v. *Woodstock School Board*, per Proudfoot, J., at Woodstock, April, 1880, because such buildings are not liable to sale in execution: *Scott* v. *Burgess*, 19 U. C. Q. B. 28; and see *Phillips*, ss. 179, 179*a*; *Thomas* v. *Urbana School Dis.*, 71 Ill. 283; *Board of Education* v. *Neidenberger*, 78 Ill. 58. Nor can the lands of a railway company be made subject to such liens: *Phillips*, s. 180; *Breeze* v. *Midland Ry. Co.*, 26 Gr. 225; *King* v. *Alford*, 9 O. R. 643. In the latter case, however, Proudfoot, J., dissented; and see *Hill* v. *Lacrosse & Mil. R. R. Co.*, 11 Wis. 214; *Phillips*, s. 182. And it has also been held in the United States that a court house: *Bouton* v. *McDonough County*, 84 Ill. 384; and buildings belonging to the State: *Thomas* v. *Industrial University*, 71 Ill. 310, are not liable to mechanics' liens.

School buildings.

Railway lands.

Court house.

Buildings belonging to the State.

(*h*) "*Shall by virtue of being so employed.*" The employment here spoken of, must be by some person having either an interest in the land on which the lien is claimed, or an interest direct, or indirect, in a contract made with a person having an interest in the land. The employment by a person having neither an interest in the land, nor an interest in a contract made with an "owner" of the land, would give no right of lien under the Act, (see *section* 2, note (*c*), *ante*, *p.* 6).

Lien-holder must be employed by some one having an interest in the land.

A question may arise whether the lien attaches from the date of the employment, or from the date of the actual commencement of some part of the work, or furnishing some part of the materials. But it would seem clear that a lien does not arise merely by contract to do the work, and that on the contrary there can be no lien at all until the work is actually commenced, or the materials begun to be furnished. The commencement of the lien would therefore appear to be coinci-

From what date lien attaches.

Commencement of work, how far essential to right of lien.

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dent with the commencement of the work, or furnishing of the materials, in respect of which it is claimed. The amount of the lien depends, it is true, on the amount due from the "owner" to the "contractor" in respect of the work and materials actually done and furnished; but though this may vary from day to day as the performance of the contract progresses, yet on the completion of the contract the lien-holder would appear to be entitled to treat his lien as one claim dating from the commencement of the performance of the contract, and not as a series of cumulative liens arising from day to day as the contract was proceeded with: see *Hydraulic Press Brick Co.* v. *Bormans*, 19 Miss. App. 664; *Great Western Planing Mill Co.* v. *Bormans*, *Ib.* 671. But see *McLaughlin* v. *Green*, 48 Miss. 175, where it was held that the lien commences from the date of the contract.

Lien relates back to commencement of work.

Where a contractor is dismissed and the owner makes an arrangement with a sub-contractor of the original "contractor" to finish the work, as to all work done after such arrangement the sub-contractor is entitled to a lien as a "contractor": *Petrie* v. *Hunter*, 2 O. R. 233; 10 App. R. 127. Such a contract is not a contract to assume the debt, default or miscarriage of another, and need not be in writing: *Ib.*

Dismissal of "contractor," right of "sub-contractor" employed to finish work.

(*i*) "*Upon the building, &c., and the lands occupied thereby, and enjoyed therewith.*" It is held in the United States that where a building is destroyed, removed, or in any manner severed from the land, the lien ceases to bind either the land or the building: *Coddington* v. *Dry Dock Co.*, 31 N. J. L. 477; *Presbyterian Church* v. *Stettler*, 26 Penn. 246, *Phillips*, s. 12. So, where, before completion, the building is destroyed by fire, the builder has no lien: see *Tompkins* v. *Dudley*, 25 N. Y. 272; but see *contra*, *Freeman* v. *Carson*, 27 Minn. 516; *McLaughlin* v. *Green*, 48 Miss. 175; but a wrongful severance of the building from the land, has been held not to defeat the lien on the land: *Steigleman* v. *McBride*, 17 Ill. 300.

Removal or destruction of building, effect of on lien.

Section 4.

It is not probable, however, that under this Act the destruction, or removal, of the building would, in any case, be held to defeat the mechanics' lien on the land; because by this Act the lien is not given merely on the building and on the land by inference, as a necessary adjunct, but it is expressly given, both on the land itself, as well as on the building: see *section* 5, s.s. 1, *post*, and notes.

Transfer of building to another lot, effect of.

Where the building is subsequently transferred to another lot, the lien will not attach upon such other lot: *Underhill* v. *Corwin*, 15 Ill. 556; but where the building was sold by a person claiming under the "owner" with notice of the lien, it was held the purchase money was subject to the lien: *Ellett* v. *Tyler*, 41 Ill. 449; *Austin* v. *Wohler*, 5 Ill. App. 300.

Sale under execution.

Where the land is sold under execution, or otherwise, the lien is transferred to the proceeds: *Phillips*, ss. 196–8.

Lien is an insurable interest.

The lien of the mechanic is held to be an insurable interest: *Franklin Fire Ins. Co.* v. *Coates*, 14 Md. 285.

Amount for which lien may be claimed.

(*j*) "*Limited in amount.*" The lien is limited in amount to such sum as is justly due to the person entitled to such lien, that is to say, the lien-holder cannot recover more than that sum: but this clause must be read in connection with sections 8 and 10: and from those sections it will appear, that although the lien-holder cannot recover more, he may not in all cases be entitled to recover against the land, as much as is justly due to him from his debtor. Where the lien-holder is a "sub-contractor," the amount for which he is entitled to enforce his lien against the land, can (except perhaps in the case of a lien for wages, and except in the case of payments by the "owner" contrary to the provision of section 9) never exceed the amount due by the "owner" to the "contractor," no matter how much more may be due to the lien-holder by the "contractor" or "sub-contractor," through whom he claims: *Briggs* v. *Lee*, 27 Gr. 464; and where there

are several "sub-contractors" of the same "contractor" or "sub-contractor," each is entitled to a *pro rata* share of the amount which the "contractor" or "sub-contractor" through whom they claim, is entitled to receive from the "owner," (see *section* 30 s.s. 6; but see *section* 6, s.s. 2, as to wages). For any excess due to the lien-holders, over and above what they can recover from the land, they are entitled, where suit is brought, to execution against their primary debtors, (*section* 30, s.s. 6).

Right of sub-contractor to charge on 10 % of price.

In addition to his lien on the land, every "sub-contractor" is also entitled to a charge upon ten *per centum* of the price to be paid by the "owner," which endures until the expiration of ten days from the completion of the work, or delivery of the materials, without either registration, or notice to the owner, (*section* 9, *s.s.* 2).

And on residue of price due by "owner."

Any "sub-contractor" may also, by giving notice to the "owner," obtain a charge for a *pro rata* share of the money due by the "owner" to any contractor, or "sub-contractor," entitled to a lien, under whom the person giving the notice claims, (see *section* 11).

Suit to enforce charge, time limited for.

It would seem that any suit to enforce a charge, either under section 6 s.s. 2, or section 11, would have to be brought within the periods limited by sections 22, 23, 24, or the right to such charge will be lost, (see *Briggs* v. *Lee*, 27 Gr. 464; *Bank of Montreal* v. *Haffner*, 29 Gr. 319; 10 App. R. 592, S. C. *sub nom Bank of Montreal* v. *Worswick*, Cass. Dig. 289).

Upon what property the lien shall attach.

5. (1) The lien (*a*) shall attach upon the estate and interest (*b*) of the owner, as defined by this Act, in the building, erection or mine upon or in respect of which the work is done (*c*) or the materials or machinery placed or furnished, and the land occupied thereby or enjoyed therewith (*d*).

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When the estate charged is leasehold the fee may be charged in certain cases.

(2) In cases where the estate or interest charged by the lien is leasehold, the fee simple (*e*) may also, with the consent of the owner thereof, be subject to said charge, provided such consent is testified by the signature of such owner (*f*) upon the claim at the time of the registering thereof, and duly verified. R. S. O. 1877, c. 120, s. 6; 47 V. c. 18, s. 5.

Mortgaged land.

(3) In case the land upon or in respect of which any work as aforesaid is executed, or labour performed or upon which materials or machinery are placed (*g*) is incumbered by a prior mortgage (*h*) or other charge, and the selling value of the land is increased by the construction, alteration or repairs of the building, or by the erection or placing of the materials or machinery, the lien under this Act shall be entitled to rank upon the increased value (*i*) in priority to the mortgage or other charge. R. S. O. 1877, c. 120, s. 7; 45 V. c. 15, s. 13.

Sub-contractors entitled to lien on land.

(*a*) "*The lien.*" This includes not only the liens of those who contract directly with the "owner," but also liens of sub-contractors between whom and the "owner" there is no privity of contract. The effect of the Act appears to be, to make each sub-contractor an assignee *pro tanto* of the original contractor through whom he claims.

Estate and interest bound by lien.

(*b*) "*Upon the estate and interest.*" The lien attaches not absolutely against the land itself, but only against such estate and interest as the "owner"—that is, the person for whom,

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directly or indirectly, the work is done or materials furnished, or any person claiming under him whose rights are acquired after the lien has attached—has in the land (see *section* 2, notes *c*, *e*; *Phillips*, s. 72); and it has been held in the United States that it is only such estate or interest as the "owner" has at the time the lien attaches, which is bound by the lien: thus, where a person having only a limited estate, such as a lessee, enters into a contract whereby liens attach on his interest, it has been held in the United States that his subsequent acquisition of the fee will not subject the latter estate also to the liens so created, (see *Phillips*, s. 74; but see *Gaule* v. *Bilyeau*, 25 Penn. St. 521). In such a case there is said to be no estoppel to prevent an "owner" from setting up the after acquired estate, in opposition to liens created by him as lessee; this, of course, is assuming that the landlord's interest had not been expressly bound (see *section* 5, s.s. 2). It seems probable, however, that under this Act it would be held that the lien binds not only the estate or interest the "owner" may have at the time the lien attaches, but also any other substantial estate or interest which he may acquire in the land so long as the lien remains in force, (see *Gaskill* v. *Trainer*, 3 Cal. 334). Where the estate of an equitable owner of the fee was subject to liens, and he subsequently got in the legal estate, both estates were held to be bound: *Rollin* v. *Cross*, 45 N. Y. 766; *McGraw* v. *Godfrey*, 16 Abb. Pr. N. S. (N. Y.) 358. And an owner who becomes the purchaser of his own estate, which is subject to liens, at a sale for taxes, has been held to buy for the benefit of all parties interested, and has not been permitted to set up the tax title in opposition to the liens: *McLaughlin* v. *Green*, 48 Miss. 175: and he cannot defeat a lien by procuring the legal title to be conveyed to his wife: *Hooker* v. *McGlone*, 42 Conn. 95.

Estate or interest subsequently acquired, how far bound by lien.

Purchase of land at tax sale by "owner," effect of.

Where the seizin of the owner is a mere instantaneous seizin, it has been held that the lien does not attach as against the estate of his grantee. Thus, where a contract

Instantaneous seizin.

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was made with one not the owner of the land at the time, but who subsequently procured a deed of it, and simultaneously gave back a mortgage for the purchase money, the work being then in progress, it was held that the lien did not bind the interest of the mortgagee, for work done either before or after the deed : *Perkins* v. *Davis*, 120 Mass. 408 ; *Ettridge* v. *Bassett*, 136 Mass. 314 ; see also *Thaxter* v. *Williams*, 31 Mass. 49 ; *Hayes* v. *Fessenden*, 106 Mass. 228 ; *Guy* v. *Carriere*, 5 Cal 511 : *Phillips*, s. 246.

Right of pre-emption.

A right of preëmption may be bound by a lien : *Turney* v. *Saunders*, 5 Ill. 527.

Lessor cannot, by surrender of term, defeat lien.

A lessee whose interest is subject to a lien, cannot defeat the lien by a voluntary surrender of the term, and, if the lessor do not discharge the lien, the lessee's interest may be sold under a judgment to enforce the lien, and the lessor has been held compelled to accept another tenant : *Dobschuetz* v. *Holliday*, 82 Ill. 371.

Only interest bound by lien is saleable.

It is only the estate or interest actually affected by the lien, which can be sold for the satisfaction of the lien : *Graham* v. *Williams*, 9 O. R. 458 ; *Phillips*, s. 186, *et seq.* ; *Huggles* v. *Blank*, 15 Ill. App. 436.

True owner when estopped from denying title in third party.

The true owner of the estate may be bound by estoppel, when he stands by, and allows another to assume to deal as the owner of the land, (see *Phillips*, s. 75 ; *Higgins* v. *Ferguson*, 14 Ill. 269 ; *Donaldson* v. *Holmes*, 23 Ill. 85).

Devise to pay off lien subject to Mortmain Act.

The lien is an interest in land, and a bequest to pay off a mechanics' lien on a church is therefore subject to the Statute of Mortmain : *Stewart* v. *Gesner*, 29 Gr. 329.

Lien only binds land on which work done.

(c) "*Upon or in respect of which the work is done.*" The lien will not extend to any land or building except that upon, or in respect of which, the work is done or materials furnished. It has been held that there can be no lien on either land or

building, for the work and labour, or materials, expended in removing a building : *Trask* v. *Searle*, 121 Mass, 229. Section 5.

When a mechanic contracts with one person for the erection of two separate buildings under two distinct contracts, each parcel of land is only liable for the building erected thereon, and the mechanic is not entitled to register a claim against both parcels for one gross sum in respect of the two ; if he include both parcels in one claim he must at least show how much is claimed against each parcel separately : *Currier* v. *Friedrick*, 22 Gr. 243 ; and see *Shaw* v. *Thompson*, 105 Mass 345. Contract to build separate buildings on distinct parcels, effect of.

In the United States it has been held, that where labour and materials are performed and furnished on the land of different owners, under an entire contract, without stating separate prices, there can be no lien on any part of the land for any part of the price : *Rathbun* v. *Hayford*, 87 Mass. 406 ; and see *Childs* v. *Anderson*, 128 Mass. 108. So also it has been held that there is no lien where the labour in respect of which it was claimed was performed partly on land which the employer owned, and partly upon land to which he had no title : *Stevens* v. *Lincoln*, 114 Mass. 476 ; *McGuinness* v. *Boyle*, 123 Mass. 570 ; and the wording of this Act would appear to justify a similar construction. Inasmuch as the lien is to be a charge on the interest of the "owner" in the building, erection or mine *upon or in respect of which the work is done* or the materials or machinery placed or furnished *and the land occupied thereby or enjoyed therewith* : upon any other construction, the lien for the work done on the land the employer did not own, would be thrown on the land which he did own, but upon which the work had not been done,—which appears to be unwarranted by the terms of this section. Contract to build for one price on land of different owners. Work done partly on land belonging to "owner" and partly on land to which he has no title, effect of.

(*d*) "*And the land occupied thereby or enjoyed therewith.*" This includes that extent of ground and no more, which, under all the circumstances, is reasonable, proper and neces- Extent of land liable to lien.

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sary for the enjoyment of the particular building. It is said that in cities the building lot attached to the house is unquestionably intended, and that in country villages, though lots are generally larger, yet they are equally necessary for the enjoyment of the various structures erected upon them, and that an acre in such villages is not unreasonable, (see *Phillips*, s. 200). And where two adjacent town lots are used together, without an actual division between them, as a mill lot, a part of the buildings and machinery being upon one, and a part upon the other, the lien extends to both lots (*Ib.*). Where the building in respect of which a lien exists is removed to another lot, the lien will not attach upon such other lot: *Underhill* v. *Corwin*, 15 Ill. 556.

Charging interest of lessor.

(*e*) "*The fee simple.*" The provisions of this section must be strictly complied with, wherever it is sought to charge the fee with a lien arising upon a contract made with a lessee. The mere fact that the lessee may have a right of purchasing the fee, and that the landlord knows that work is being done, or materials furnished, upon the demised premises, at the request of the lessee, does not make the landlord's estate liable to be charged, even though in certain contingencies the latter may possibly become entitled to the benefit of erections or improvements so made: *Graham* v. *Williams*, 8 O. R. 478; 9 O. R. 458.

Signature of lessor, to claim for lien.

Registration of.

(*f*) "*Signature of such owner.*" The signature of the landlord upon the statement of the claim registered, is essential to a charge upon his estate, for any liability upon a contract made with his lessee. It will be seen by section 22 that it is not necessary in every case to register a lien. Where a suit is brought within the period prescribed by that section, and a certificate of *lis pendens* is registered, the previous registration of the lien is dispensed with altogether; but whenever a landlord's estate is sought to be charged, it seems essential that a claim of lien should be registered before suit.

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Commencement of lien against lessor's interest.

The statute is not very clear, whether the lien against the landlord's estate is to rank as from the date when the lien attached against the lessee's interest, or whether it dates only from the time of the registration of the claim. As between the lien-holder, and a purchaser or mortgagee for value from the landlord without notice of the lien, equity would seem to require that the lien should only date from the time of registration of the claim, bearing the landlord's signature as required by this section.

Incorporation of work or materials, essential to give right as against prior mortgagee.

(*g*) "*Materials or machinery are placed.*" Although, as we have seen, a lien may in some cases exist for materials furnished "to be used" in the construction or repair of a building, although such material may not be actually incorporated, (see *ante*, p. 19, note *e*), yet, under this section, it is clear that there must be an actual incorporation of the material, in order to give a lien-holder any prior claim as against a prior mortgagee, because it is of the very essence of this provision in favour of the lien-holder, that the value of the land is increased by the work done, and materials furnished, in respect of which the lien is claimed.

Prior mortgage, meaning of.

(*h*) "*Prior mortgage.*" In R. S. O. (1877) c. 120, s. 7, from which this sub-section is taken, the words were "encumbered by a mortgage or other charge existing, or created, before the commencement of the work or the placing of the materials or machinery upon the land" the words "prior mortgage" are no doubt intended to be equivalent for the words used in the Revised Statutes, 1877. The expression "prior mortgage," seems however, to open the door to a conflict of opinion, as to what are to be regarded as prior mortgages. A question may arise whether a mortgage made after a contract has been entered into, but before there has been any part performance of it, is, or is not, a "prior mortgage"; a question which could not have arisen under the former wording of the section. After the contract, and before commencement of its performance, the contractor has such an inchoate right

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of lien that he is authorized to register a claim therefor, (see *section* 21), which on the subsequent performance of the work will be complete.

As against a registered lien, a mortgage or other charge, in order to have priority over the lien, must have been registered previously to the lien, or the lien-holder must have had actual notice of such mortgage before acquiring his lien,* otherwise the registered lien-holder would be entitled to priority to the full amount of his lien, (see *The Registry Act*, s. 76, and see *post*, *section* 19). When a mortgage is given to secure further advances, and the mortgagee makes further advances subsequently to the acquisition of a right of lien under this Act, but before such lien has been registered, and before the mortgagee has actual notice of the lien, the latter is entitled to priority over the lien-holder in respect of such further advances: *Richards* v. *Chamberlain*, 25 Gr. 402; *Re Craig*, 3 C. L. T. 401.

Extent of lien as against prior mortgage.

(*i*) "*Upon the increased value.*" It will be observed that the lien-holder is not entitled to priority for the full value of the improvements effected by him, or by means of his labour or materials, but merely in respect of the amount, if any, by which the selling value of the property has been increased by such improvements. This must be largely a question of opinion, and the onus will lie upon the lien-holder claiming priority to a prior mortgagee, to establish by what amount the selling value has been increased by the improvements in respect of which he claims a lien. Where improvements have been made by several parties each is entitled to share *pro rata* in the increased selling value, in the proportion which the value of the work done, or materials furnished by him, bears to the value of the whole improvements: *Broughton*

Lien-holders to share *pro rata*, as regards prior mortgages.

* It may be a question whether actual notice at any time before registering the lien would not be sufficient to postpone the lien-holder: see R. S. O. c. 114, s. 82; *Rose* v. *Peterkin*, 13 S. C. R. 710, per Strong, J.

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v. *Smallpiece*, 25 Gr. 290, *S. C.* before Master, 7 P. R. 270; and see *Bank of Montreal* v. *Haffner*, 3 O. R. 183. In *Broughton* v. *Smallpiece* it was held that where the property is insufficient for the payment of the mortgage debt, the lien-holder is bound to credit as against the sum in respect of which he is entitled to priority, all payments made on account of his claim; and that all payments made by the "owner" in reduction, or satisfaction, of the claims of lien-holders, will be deemed to be made in ease of the mortgagee. Under the ordinary rule, in regard to the application of payments, the creditor, in the absence of an express appropriation by the debtor to the contrary, would be entitled to apply money received from the debtor, in discharge of that claim for which he holds the least security, (see *Armour* v. *Carruthers*, 4 U. C. L. J. 210; *Fraser* v. *Locie*, 10 Gr. 207); and it might, with some reason, be urged that a lien-holder, receiving payments from his debtor generally on account, is entitled to apply them first in discharge of that part of his claim which is practically unsecured; and when such appropriation by the lien-holder has been actually made, it is possible the rule laid down in *Broughton* v. *Smallpiece* would not apply.

Payments by "owner," how to be credited as between mortgagee and lien-holders.

Where relief is claimed against a mortgagee under this section, the mortgagee is a necessary party to the writ, and the statement of claim should distinctly allege that the mortgage is prior to the lien. Where a bill of complaint under the former practice in Chancery stated the date of the mortgage as "on or about," etc., it was held insufficient to found a decree against the mortgagees, notwithstanding that they had suffered the bill to be taken *pro confesso* against them: *Douglas* v. *Chamberlain*, 25 Gr. 288, and see *Richards* v. *Chamberlain*, *Ib.* 402. The action against the mortgagee must be commenced within the period limited by sections 22, 23, 24. Thus, where a lien-holder had within the proper time commenced proceedings against the "owner" and had obtained a decree against him to enforce the lien, it was held

Parties to suit to enforce lien as against prior mortgagee.

Time limited for bringing action against prior mortgagee.

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he could not afterwards file another bill, to obtain relief as against a prior mortgagee under this section, after the time limited by sections 22-24 for bringing a suit had expired: *Bank of Montreal* v. *Haffner*, 29 Gr. 319; 10 App. R. 592; *S. C. sub-nom. Bank of Montreal* v. *Worswick*, Cass. Dig. 289; and neither, it would appear, could mortgagees be made parties by amendment after the time has elapsed for commencing a suit under sections 22-24, even though the action might originally have been commenced in time, (see *Shaw* v. *Cunningham*, 12 Gr. 101; *McDonald* v. *Wright*, 14 Gr. 284).

Landlord whose tenant has right of purchase, not a mortgagee.

A landlord, who has leased with a right to the tenant to become the purchaser, cannot be treated as a mortgagee under this section: *Graham* v. *Williams*, 9 O. R. 458.

Lien for 30 days' wages.

6.—(1) Without prejudice to any lien (*a*) which he may have under the preceding sections, every mechanic, labourer, or other person, who performs labour for wages upon the construction, alteration, or repairs of any building or erection, or in erecting, or placing machinery of any kind in, upon, or in connection with, any building, erection, or mine, shall to the extent of the interest of the owner have, upon the building, erection, or mine, and the land occupied thereby or enjoyed therewith, a lien for such wages, not exceeding the wages of thirty days, or a balance equal to his wages for thirty days.

Property affected.

(2) The lien for wages given by this section shall attach (*b*) when the labour is in respect of a building, erection or mine on property belonging to the wife of the person at whose instance the work is

done upon the estate or interest of the wife in such property, as well as upon that of her husband. 45 Vict. c. 15, ss. 2, 3. Sections 6, 7.

(*a*) "*Without prejudice to any lien.*" This section is taken from 45 Vict. c. 15, and at the time that Act was passed it was possible, as the law then stood, for a "contractor" or "sub-contractor," by agreement, to deprive any "sub-contractor claiming" under him of a right to a lien. One of the objects of the 45 Vict. c. 15 was to prevent the making of any such agreements to the prejudice of liens for wages for thirty days. Subsequently by 47 Vict. c. 18, (see *ante*, *sec.* 3) it was provided that in no case should any such agreement deprive any one otherwise entitled to a lien, of the benefit of the lien. This amendment is embodied in sections 3 and 4, which apply to all liens. This first sub-section therefore now confers no right on the wage earner which he does not already enjoy to a fuller extent under the previous sections of the Act, and it seems to have been a mistake to include this sub-section in the revised Act. Effect of sub-section 1.

(*b*) "*Shall attach.*" The wording of this sub-section has been amended by the revisers of the statutes; formerly it omitted to state upon what the lien was to attach; it is now made clear, that the lien is to attach on both the interest of the husband and the wife. *Prima facie* the interest of the wife would not be bound by a contract with her husband, (see *ante*, p. 5, note *c*), and this sub-section therefore creates an exception to the general rule in favour of liens for thirty days' wages. In order to preserve the right given by this section the lien must be duly registered as provided by section 20, s.s. *a*, *b*. Lien for wages, when it binds land of married woman.

7. In all cases, the owner shall, in the absence of a stipulation to the contrary, be entitled to re- Owner may retain 10 per

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cent. of contract price.

tain (*a*), for a period of thirty days after the completion of the contract, ten per centum of the price to be paid to the contractor. 45 V. c. 15, s. 5.

(*a*) "*Be entitled to retain.*" This provision appears to be introduced for the purpose of enabling the "owner" to meet the liability imposed upon him by the preceding section. The period of thirty days after the completion of the contract covers the period allowed for registering liens, (see *post*, *sections* 20, 21).

Claim by sub-contractor limited.

8. In case the lien is claimed by a sub-contractor, the amount which may be claimed in respect thereof shall be limited to the amount payable to the contractor (*a*) or sub-contractor (as the case may be) for whom the work has been done, or the materials or machinery have been furnished or placed. R. S. O. 1877, c. 120, s. 6.

Ordinarily the claims of sub-contractors against the land, cannot exceed amount due by "owner" to "contractor."

Exception to rule.

(*a*) "*Limited to the amount payable to the contractor.*" No matter what sum may be the aggregate of the claims of "contractor" and "sub-contractors" they cannot ordinarily be enforced against the land, for any sum beyond what is due from the "owner" to the "contractor,"—unless the "owner" have made payments to the "contractor," in order to defeat or impair the claim of other lien-holders, (see *section* 9), or within ten days after the completion of the work, in respect of which a lien exists, have made payments exceeding ninety per cent. of the contract price, (*section* 9, s.s. 2),—and even then only to the additional extent of such payments: *Briggs* v. *Lee*, 27 Gr. 464. If no payment is, under the contract, to be made to the contractor till the work is completed by him, and it never is completed by him, nothing will be

due to him: *Appleby* v. *Myers*, L. R. 2 C. P. 651; and consequently it would seem that in such a case nothing could be recovered by any sub-contractor under him. Sections 8, 9.

As to the effect of payments made under the contract upon the right of lien, see *section* 9.

Certain payments to discharge the lien.

9.—(1) All payments, up to ninety per centum (*a*) of the price to be paid for the work (*b*), machinery or materials, as defined by section 4 of this Act, made in good faith (*c*) by the owner to the contractor, or by the contractor to the sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing (*d*), by the person claiming the lien has been given to such owner, contractor or sub-contractor (as the case may be), of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by this Act (*e*), but this section shall not apply to any payment made for the purpose of defeating or impairing a claim to a lien existing or arising under this Act. 41 Vict. c. 17, s. 1.

Lien to extent of 10 per cent. when a charge.

(2) A lien shall, in addition to all other rights or remedies given by this Act (*f*), also, operate as a charge (*g*) to the extent of ten per centum of the price to be paid by the owner (*h*) for the work, machinery or materials as defined by section 4 of this Act, up to ten days after the completion of the work, or of the delivery of the mate-

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rials, in respect of which such lien exists, and no longer, unless notice in writing (*i*) be given as herein provided. 41 V. c. 17, s. 2.

Priority of lien for 30 days' wages.

(3) A lien for wages for thirty days, or for a balance equal to the wages for thirty days, shall, to the extent of the said ten per cent. of the price to be paid (*k*) to the contractor, have priority (*l*), over all other liens under this Act, and over any claim by the owner against the contractor (*m*) for, or in consequence of, the failure of the latter to complete his contract. 45 V. c. 15, s. 4.

Payments by "owner" to "contractor," how far valid as against sub-contractors.

(*a*) "*All payments up to ninety per centum.*" This section as originally passed applied to all payments, (see *R. S. O.* 1877, *c.* 120, *s.* 11) by amendment, the words "up to ninety per centum" were introduced, but, by what appears to be an oversight, the amending Act, while providing that lien-holders should in certain circumstances be entitled to a charge on the remaining ten per cent., omitted to make any provision expressly validating the payment of the ten per cent. under any circumstances. It is possible that a *bona fide* payment of the ten per cent. of the price after the lapse of the ten days mentioned in sub-sec. 2, and before notice in writing to the person making payment, or registration of any lien, would be a valid payment, or discharge *pro tanto*, of any lien that might be subsisting; but this is not expressly provided, and is only to be drawn by inference from the statute.

Payments by the owner exceeding the ninety per cent. before the lapse of the ten days, even if made pursuant to the contract, are not protected as against the charge of sub-

contractors. But when the contract is not completed by the original contractor, and the "owner" *bona fide* pays for the full amount of all work actually done by him, a sub-contractor has no charge upon the ten per cent. as against the owner: *Briggs* v. *Lee*, 27 Gr. 464; *Schultz* v. *Hay*, 62 Ill. 157; but as to claims of wages, see *post*, note *m*.

(*b*) "*Of the price to be paid for the work.*" These words would seem to apply to the price to be paid under the contract, by virtue of which the payments are made, whether such contract be made between the owner and contractor, or between a contractor and a sub-contractor, or between one sub-contractor and another sub-contractor. The Act does not in terms state what is to be the effect of a sub-contractor making a payment in excess of the ninety per cent. No charge appears to be given in favour of any sub-contractor on the contract price payable by a contractor, or, sub-contractor, to any other sub-contractor under whom a lien is claimed. The charge given by sub-section 2 *supra*, it will be observed, is confined to ten per cent. of the price payable by the "owner." It seems clear that the land of the "owner" could not be made chargeable in respect of wrongful payments made by a contractor or sub-contractor to which the "owner" was no party, except perhaps to the extent of any sum for which the land might be liable to a lien, in favour of the contractor or sub-contractor making such wrongful payment. Any sub-contractor prejudiced by the wrongful payment, would seem to have an equity to rank in place of the party making the wrongful payment, on the ten per cent. of the price payable by the "owner," on which a charge is created in favour of lien-holders by sub-section 2 *supra*.

"Owner" not chargeable with wrongful payments by "contractor," etc.

(*c*) "*Made in good faith.*" The registration of a lien of a sub-contractor will not invalidate payments subsequently made *bona fide* by an owner, on whom no written notice of the lien has been served, provided such payments do not in

Payments by "owner" before notice of lien of sub-contractor.

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the aggregate exceed the ninety per cent. of the contract price, (see *Phillips*, s. 63) : not even though such payments exceed the full amount due to a contractor, who subsequently abandons his contract : *Briggs* v. *Lee*, 27 Gr. 464.

Notice must be in writing.

A sub-contractor, in order to prevent his lien from being defeated by payments by the "owner," must give "notice in writing" of his lien to the "owner" : *Worrell* v. *Lee*, per Blake, V. C., 19th May, 1879.

The reasonableness of this provision is apparent, for if registration of the lien intercepted the right to make payments, it would be incumbent on every "owner," "contractor" or "sub-contractor," not only to search in the registry office for liens every time he might wish to make a payment on his contract, but all such payments would have to be made in the registry office, for fear that, between the search and the payment, a lien might be registered. Only payments made in good faith are protected. Payments made for the purpose of defeating or impairing a claim to a lien existing or arising under the Act, would be void as against the person entitled to such lien. In the absence of any decision on the subject, it would seem probable that payments to a contractor made in advance, or before they were due under the contract, or payment to one sub-contractor in full and to another nothing, as the partiality of the payer might determine, would be held not to be *bona fide* as against other lien-holders, (see *Phillips*, ss. 62*c*, 62*g*, 62*h*).

(*d*) "*Notice in writing.*" The notice must be given by the sub-contractor claiming a lien. The object of this section is primarily, to define under what circumstances payments by an "owner" to his "contractor" may be validly made, so as to be good as against the sub-contractors claiming under such contractor or any of his sub-contractors. For form of notice see Appendix.

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(*e*) "*Lien created by this Act.*" That is the lien on the estate or interest of the "owner" in the land upon which the work or materials have been expended, and this includes not only the lien of the "contractor," but also the liens of all sub-contractors claiming under such "contractor."

No charge on 10 % of price, except there be a valid lien.

(*f*) "*Given by this Act.*" It is only where a lien exists under the Act, that any charge upon the ten per cent. of the price can be claimed. Thus, where it was held that the mechanic doing work on a public school building was not entitled to any lien on the land, it was also held he had no lien or charge upon the contract price: *Robb* v. *School Board of Woodstock*, per Proudfoot, V. C., at Woodstock, April, 1880; and see *Briggs* v. *Lee*, 27 Gr. 464; *Forhan* v. *Lalonde*, 27 Gr. 600; and see *ante*, p. 19, note *g*.

Sub-contractors entitled to charge on 10 % of price.

(*g*) "*Operate as a charge.*" It cannot be supposed that the statute intended to create a charge in favour of contractors upon money to which they are entitled by contract. The charge, therefore, created by this section must have been intended for the benefit of "sub-contractors" only, and to enable them to intercept money due from the "owner" to the "contractor" under whom they claim. Where there are several sub-contractors, each, according to his class, would be entitled to a *pro rata* share of the ten per cent. on which a charge is here given; except those entitled to liens for wages for 30 days or less. This latter class of lien-holders are entitled to priority over all other lien-holders in respect of the ten per cent. (see *section* 9, s.s. 3). Where a contractor, however, makes default, and never earns the ten per cent., a sub contractor under him has no lien against the "owner" in respect of the ten per cent.: *Goddard* v. *Coulson*, 10 App. R. 1; *Harrington* v. *Saunders*, 23 C. L. J. 48; 7 C. L. T. Occ. N. 88.

Preferential charge of liens for wages.

On what fund charge created.

(*h*) "*To be paid by the owner.*" The charge hereby created is upon ten *per centum* of the price to be paid by the

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"owner." There is no charge in terms created upon money due to a "sub-contractor" from a "contractor" or another "sub-contractor;" but the right of any sub-contractor to participate in the ten per cent. of the price to be paid by the "owner" would, however, appear to be subject to the charge of any sub-contractor to whom he might be indebted. And when a "contractor" pays his immediate "sub contractors" in advance, and such payments exceed the ninety *per centum* of the price to be paid by the "owner," any person who has been employed by the sub-contractors who have been so overpaid, would seem to have an equity to stand in the place of the "contractor," and to receive from the "owner" so much of the ten per cent. as he has lost by reason of the "contractor" making such payment in advance.

Owner need not keep back 10 % of the price of all work actually done.

Under this section it is not necessary for the owner to reserve ten per cent. of the price of the work done from day to day, so as always to have in hand ten per cent. of the contract price of the work actually done. He is protected if his payments to the contractor do not exceed ninety per cent. of the whole contract price. If the contractor, by his default, never earns the remaining ten per cent. there is no charge upon it in favour of any of his sub-contractors: *Briggs* v. *Lee*, 27 Gr. 464; *Goddard* v. *Coulson*, 10 App. R. 1; *Schultz* v. *Hay*, 62 Ill. 157; see, however, *Re Cornish*, 6 O. R. 259.

Notice of lien, when to be given to "owner."

(*i*) "*Unless notice in writing.*" The notice is that referred to in the preceding sub-section 1. If the notice be not given within ten days after the work has been done, or materials furnished by the sub-contractor giving it, it must be given before the payment is made by the "owner," otherwise the payment, if made in good faith, will be protected under the preceding sub-section, (so held by Blake, V.C., *Worrell* v. *Lee*, 19th May, 1879).

Ten per cent., how ascertained.

(*k*) "*Ten per cent. of the price to be paid.*" The words "price to be paid" would seem to mean the price to be paid

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Priority of liens for wages.

on the whole contract with the "contractor," under whom the lien-holder claims, assuming the contract to be fully carried out. By section 9, s.s. 2, lienholders in general are entitled to a charge upon this ten per cent., but liens for wages (not exceeding thirty days) are, by this section, given a priority over all other liens upon this ten per cent. As regards lien-holders, other than for wages for thirty days or less, their right to the charge on the ten per cent. may be defeated by the failure of the "contractor" to earn it: (*section* 8, *Goddard* v. *Coulson*, 10 App. R. 1; *Harrington* v. *Saunders*, 23 C. L. J. 48; 7 C. L. T. 88); but the object of this section appears to be, to make the "owner" liable for the liens of sub-contractors for wages to the extent of ten per cent., whether the contractor under whom they claim shall have earned it or not. Whether the Act carries out the intention is perhaps open to doubt, (see *infra* note *m*).

(*l*) "*Have priority.*" The general rule is that all lien-holders of the same class are to rank *pari passu*, (see *section* 30, s.s. 6), but this section makes an exception to the general rule in favour of liens for thirty days' wages. Where there are several liens for wages on the same property, it would seem that all are entitled to rank amongst themselves *pari passu* to the extent of thirty days' wages, but in priority to all other liens: the intention of the Act being, apparently, to place such lien-holders in the position of "contractors," as regards the ten per cent. of the price, even though as a matter of fact they may be mere sub-contractors. In order to preserve the priority given by this section the lien must be registered as provided by section 20.

Claim by "owner" against defaulting "contractor," how far subject to charge in

(*m*) "*Over any claim by the owner against the contractor*," *etc.* But for this section, it is clear that the right of any sub-contractor to recover against the owner must depend upon whether, as a matter of law, there is anything due by the "owner" to the "contractor" under whom the sub-contractor

Sections 9, 10. claims. If the contractor make default in performance of his contract, he may be, and often is, unable to recover from the "owner," even for the work he has actually performed, and consequently would not, in such a case, be entitled to recover against the "owner" the ten *per centum* of the price referred to in this sub-section, (*supra* note *h*).

favour of lien-holders.

It is possible that the Legislature may have intended in such a case to give the lien-holder for thirty days' wages a charge on the ten per cent. of the price, even though it may not have been earned by the contractor, but it is doubtful whether the words actually used are sufficient for that purpose. The right of an "owner" to resist payment of any part of the price on the ground of non-performance of the contract is not a claim against the "contractor," it is merely a defence to a claim by the "contractor": but the "owner" may have a claim "against the contractor for or in consequence of the failure of the latter to complete his contract" in the nature of a claim for damages for breach of the contract, which, under the present practice, might no doubt be counter-claimed in any action brought by the "contractor" against the "owner" for the price, either upon the contract, or upon a *quantum meruit:* or the contract may provide that, on default of the "contractor," the "owner" may proceed and complete the work himself, and deduct the cost of so doing from the contract price; and upon a proper construction of this section it would appear that it is only over such claims of the "owner" that the lien for thirty days' wages is given priority. If that be the proper construction of this clause, then the lien of a sub-contractor for wages may in some cases be liable to be defeated in the same manner as other liens by the default of the "contractor."

Extent of owner's liability.

10. Save as herein provided (*a*), the lien shall not attach so as to make the owner liable to a greater sum than the sum payable by the owner to

the contractor (*b*). R. S. O. 1877, c. 120, s. 6, *part;* 45 V. c. 15, s. 4. Secs. 10, 11.

(*a*) "*Save as herein provided.*" See section 9.

(*b*) "*Payable by the owner to the contractor.*" No matter what may be the aggregate amount of the claims of a "contractor" and his "sub-contractors," they cannot in any event, (except perhaps in the case of liens for wages under the preceding section) be enforced against the land, for any sum beyond what is due from the "owner" to the "contractor," unless the "owner" has made payments to the contractor in order to defeat or impair the claim of the lien-holders (see *section* 9, s.s. 1), or within the prescribed term has made payments exceeding ninety per cent. of the contract price (*Ib.*), and even then only to the additional extent of such payments: *Briggs* v. *Lee*, 27 Gr. 464. Sub-contractors' liens, cannot exceed what is due by "owner" to "contractor."

Where the owner has agreed to pay the contractor for the work done according to the certificate of an architect or engineer that the work has been completed, and not otherwise, the certificate must be obtained before the owner can be compelled to pay, and, in the absence of fraud, the contractor is bound by the certificate and cannot dispute it: *Canty* v. *Clarke*, 44 Q. B. 505; *Sharpe* v. *San Paulo Ry.*, L. R 8 Chy. 597. But when the contractor is wrongfully dismissed by the architect, and thereby prevented from obtaining the architect's certificate, he may recover the balance due to him for the work actually performed: *Smith* v. *Gordon*, 30 C. P. 553. Production of engineer's certificate, when condition precedent.

11. All persons furnishing material to or doing labour for (*a*) the person having a lien under this Act (*b*), in respect of the subject of such lien, who notify the owner of the premises sought to be affected thereby, within thirty days after such Notice to owner of claims against lien-holders.

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material is furnished, or labour performed (*c*), of an unpaid account or demand against such lien-holder, for such material or labour, shall be entitled, subject to the provisions of sections 6 and 9, to a charge therefor *pro rata* upon any amount payable by such owner under said lien (*d*); and if the owner thereupon pays (*e*) the amount of such charge to the person furnishing material and doing labour as aforesaid, such payment shall be deemed a satisfaction *pro tanto* of such lien. R. S. O. 1877, c. 120, s. 8.

Formerly sub-contractor's only remedy was by giving notice.

(*a*) "*All persons furnishing materials to, or doing labour for.*" This section was part of the original Act of 1873, which allowed liens to be registered only by persons who contracted directly with the "owner." The giving notice under this "section" was at first the only remedy a sub-contractor had, but, by the Act of 1874, the right to register liens on the land was extended to all sub-contractors. The latter have, therefore, now the double right to register, and enforce their liens by suit, against the land, or to give notice under this section.

Now have double remedy.

Sub-contractor may give notice to "owner" though "contractor" do not claim a lien.

(*b*) "*The person having a lien under this Act.*" Under the Act a contractor, or sub-contractor, is entitled to a lien on the land for work or materials, by virtue of being so employed or furnishing, (see *section* 4), and no active assertion of a claim, on the part of the person working, or furnishing material, is essential to his right of lien. The right of lien is given by the statute, and enures to the benefit of the lien-holder, in the absence of any agreement on his part to the contrary, without registration, bringing suit, or giving any notice, until the lapse of thirty days after the work is com-

pleted or the material furnished: although registration within that time may be necessary to protect the right of the lien-holder as against transfers by the "owner," of the land or any interest therein to third parties not having an actual notice of the lien, (see *ante*, pp. 8-10).

The words "having a lien" do not include a person who has debarred himself by express agreement from having a lien. But though as to such persons, sub-contractors under them may be deprived of any benefit of this section; they may, nevertheless, notwithstanding such agreement, be themselves entitled to a lien on the land which they may enforce, (see *ante*, *section* 4).

Time within which sub-contractor to give notice to "owner."

(c) "*Within thirty days after such material is furnished, or labour performed.*" That is, by the person giving the notice. Until this period has elapsed, the lien of the "contractor" or "sub-contractor" for whom the work has been done, or materials furnished, will continue without registration or suit, not only for the work done, and materials furnished, by himself, but also for that which he has procured to be done and furnished by others, and for the payment of which he is liable, (see *ante*, *section* 4, note *c*). After that period, assuming that the whole work and materials required under the lien-holder's contract have been completed, the lien on the land ceases unless it has been registered, or a suit brought to enforce it, and a certificate of the pendency of the suit registered, (see *post*, *sections* 22, 23, 24). There may be cases, however, where the lien of a lien-holder will endure for a longer period than that which is limited for giving the notice by a sub-contractor under this section; as, for instance, where a contractor, or sub-contractor, sublets his contract to various sub-contractors, and these sub-contractors finish their work at different times. In such a case the time for each sub-contractor to give notice is governed by the time he completes his own particular work, or finishes furnishing

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materials; but the contractor or sub-contractor by whom he is employed will be entitled to a lien, without registration, until the lapse of thirty days from the completion of the whole of the work for which he has contracted.

Charge of sub-contractor giving notice to owner is upon money.

(*d*) "*Shall be entitled, subject to the provisions of sections* 6 *and* 9, *to a charge therefor pro rata, upon any amount payable by such owner under said lien.*" The charge here created is upon the *money* payable by the "owner" to the person entitled to the lien, and is not upon the land. All sub-contractors of a lien-holder entitled to give, and giving notice, under this section, stand on an equal footing, and are entitled to a *pro rata* share of the amount payable by the "owner" to their common debtor.

Payment of claim of sub-contractor by "owner."

The Act of 1873, sec. 11, expressly provided that the owner should "thereupon pay the amount of such charge." The omission of these words, however, would not seem to alter the liability of the "owner," as the fact that the person giving notice is entitled to a charge, involves the right to enforce that charge by suit, in default of payment by the "owner." Where nothing is due by the "owner" to the "contractor," none of the "sub-contractors" under him, giving notice under this section, are entitled to anything: *Briggs* v. *Lee*, 27 Gr. 464; and see *section* 10.

Effect of payment by "owner" of sub-contractor's claim.

(*e*) "*And if the owner thereupon pays.*" It would not be safe for an "owner" to pay any claim of which he receives notice under this section, without first informing the primary debtor of the claim, in order to give him an opportunity of disputing its validity if he desires to do so. Payments made by an "owner" to a sub-contractor serving notice under this section, before such sub-contractor's claim has been ascertained by arbitration, are at the risk of the "owner," and are only a valid discharge *pro tanto* of the lien, provided such indebtedness actually existed, (see *post*, *section* 13, note *e*).

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Disputes as to claims against lien-holders.

12. In case of a dispute (*a*) as to the validity or amount of an unpaid account or demand, of which notice is given to the owner under the preceding section, the same shall be first determined (*b*) by action in the proper Court in that behalf, or by arbitration, in manner mentioned in section 14 at the option of the person having the unpaid account or demand against the lien-holder; and pending the proceedings to determine the dispute, so much of the amount of the lien as is in question therein may be withheld from the person claiming the lien (*c*). R. S. O. 1877, c. 120, s. 9.

(*a*) "*In case of a dispute.*" The dispute here contemplated is one between a "sub-contractor" giving notice under the preceding section and the person by whom he was employed, or between such sub-contractor and the "owner."

Disputed claim of sub-contractor must be settled by action, or arbitration, before payment by "owner."

(*b*) "*The same shall be first determined.*" The word "shall" is imperative: (see *R. S. O.* 1887, c. 1, s. 8, s.s. 2). Formerly the dispute was required to be settled by arbitration, but now it may be settled either by action, or arbitration, at the option of the sub-contractor giving the notice. The settlement of the dispute in one of these ways, must take place before the "owner" can properly pay the claim of the sub-contractor, or any part of it affected by the dispute,—and the reason for this is obvious, because what the sub-contractor endeavours to do by giving notice under section 11, is to intercept money which would otherwise be payable by the "owner" to the "contractor," under whom such sub-contractor was employed—and it is only reasonable, that disputes between the latter should be adjusted, before the claim of the sub-contractor is satisfied.

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(*c*) "*May be withheld from the person claiming the lien.*" The words "claiming the lien" obviously refer to the contractor or sub-contractor, under whom the sub-contractor giving the notice under section 11 claims. It is enough that such contractor or sub-contractor has a lien, though he may not be actively claiming it. The Revisers of the Statutes altered the wording of section 11 from "claiming" to "having," and no doubt a similar change should have been made in this section, (see *Briggs* v. *Lee*, 27 Gr. 467).

Failure to pay amount awarded.

13. In case the person primarily liable (*a*) to the person giving such notice as mentioned in section 11 fails to pay the amount awarded (*b*) within ten days after the award is made, the owner, contractor or sub-contractor may pay (*c*) the same out of any moneys due by him to the person primarily liable as aforesaid, on account of the work done or materials or machinery furnished or placed in respect of which the debt arose; and such payment if made after an award (*d*) (or if made without any arbitration having been previously had or dispute existing, then, if the debt in fact existed (*e*), and to the extent thereof) shall operate as a discharge *pro tanto* of the moneys so due as aforesaid to the person primarily liable. R. S. O. 1887, c. 120, s. 10.

Primary debtor, who is.

(*a*) "*In case the person primarily liable.*" The person primarily liable to the sub-contractor who gives a notice under section 11, is the contractor, or sub-contractor, by whom the sub-contractor giving the notice was actually employed to do the work or furnish materials.

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(*b*) "*Fails to pay the amount awarded.*" By the preceding section the amount may be ascertained not only by arbitration but also by judgment in an action; the phraseology of this section is due to the fact that formerly the only means of obtaining an adjustment of a disputed claim of a sub-contractor giving a notice to the "owner" under section 11 was by arbitration. The alteration of section 11 by enabling such disputes to be settled also by action, seems to have been overlooked in the revision of this section.

Payments by contractors or sub-contractors.

(*c*) "*The owner, contractor, or sub-contractor may pay.*" It will be seen that section 11 only provides for notice being given to the "owner," and imposes no duty on him to communicate such notice to any contractor or sub-contractor under whom the person giving the notice may claim. Payments made by contractors or sub-contractors are, however, validated under this section, as well as payments by the "owner."

Effect of payment by "owner" to sub-contractor after award.

(*d*) "*Such payment if made after an award.*" It will be observed that this section makes no provision for payments made after a judgment in an action brought by the sub-contractor under section 12. It is therefore doubtful whether a payment made to a sub-contractor giving notice under section 11, after a judgment in his favour, would protect the person paying him, as against the person claimed to be primarily liable, should such judgment be subsequently reversed. See, however, *In re Smith*, 20 Q. B. D. 321, where a payment by a garnishee was held to be good, although the judgment, under which the garnishee order was obtained, was subsequently declared invalid.

Payment made after an award, would appear to be clearly a protection to the payer as against the person claimed to be primarily liable, even though the award be subsequently set aside. The remedy of the latter in such a case would appear

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to be against the payee only. If the person claimed to be primarily liable intend to dispute the award, it would seem that he should at once institute an action to restrain the payment of the disputed claim.

Effect of payment by "owner" to sub-contractor before award.

(*e*) "*Then if the debt in fact existed.*" If the "owner," "contractor" or "sub-contractor" assume to pay the claim of a sub-contractor who gives notice under section 11 without an award being first made on the claim, such payment, it seems, is no discharge *pro tanto* of the payer as against the person claimed to be primarily liable to the payee, unless the debt was in fact actually due by the alleged primary debtor. In order to protect a person thus assuming to pay a sub-contractor giving notice under section 11 without an award, the consent of, or admission of the debt by, the alleged primary debtor, should be first obtained ; and there appears to be no obligation to make the payment until such consent or admission is obtained.

Disputed claims of sub-contractors, to be referred to arbitration.

14.—(1) In case a claim is made by a sub-contractor (*a*) in respect of a lien (*b*) to which he is entitled, and a dispute arises (*c*) as to the amount due or payable in respect thereof, the same shall be settled by arbitration (*d*).

Appointment of arbitrators.

(2) One arbitrator shall be appointed by the person making the claim, one by the person by whom he was employed, and the third arbitrator shall be appointed (*e*) by the two so chosen.

Decision to be final.

(3) The decision of the arbitrators or a majority of them shall be final and conclusive (*f*). R. S. O. 1877, c. 120, s. 18.

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(4) In case either of the parties interested in any such dispute refuses or neglects within three days after notice in writing requiring him to do so, to appoint an arbitrator, or if the arbitrators appointed (*g*) fail to agree upon a third, the appointment may be made by a County Judge of the county in which the lands in respect of which the lien is claimed are situate (*h*). R. S. O. 1877, c. 120, s. 19.

Refusal to appoint arbitrator.

(*a*) "*By a sub-contractor.*" As to persons coming within the designation of "sub-contractor," see *section* 2, s.s. 2.

(*b*) "*In respect of a lien.*" This refers to a lien on the land to which the sub-contractor is entitled, and not to the charge upon the money payable by the "owner" under his contract, under section 11.

(*c*) "*A dispute arises.*" The dispute here contemplated is one between the "sub-contractor" and the person by whom he is employed.

(*d*) "*Shall be settled by arbitration.*" The word "shall" is imperative, (see *R. S. O.* c. 1, s. 8, s.s. 2).

(*e*) "*The third arbitrator shall be appointed.*" This sub-section provides that the third arbitrator shall be appointed by the arbitrators chosen by the parties. Sub-section 4 provides for the appointment of an arbitrator by the County Judge, in case of either party refusing or neglecting to appoint an arbitrator under this sub-section; but no provision is made empowering an arbitrator appointed by the Judge for one of the parties, joining with his co-arbitrator in appointing a third arbitrator. In such a case possibly the arbitrator appointed by the Judge might be held to have the power, but it would seem that an application should be made

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to the Court to appoint the third arbitrator, (see *Malloch* v. *Grand Trunk Ry.*, 6 Gr. 348).

Award, how far final.

(*f*) "*Shall be final and conclusive.*" Notwithstanding these words the parties are not precluded from disputing the validity of the award where the arbitrators have acted illegally, (see *Kennedy* v. *Burness*, 15 U. C. Q. B., per Burns, J., at p. 491). The award must be concurred in by at least two of the arbitrators, an award of the third arbitrator alone would be invalid: *Wilson* v. *York*, 46 U. C. Q. B. 289; and see, also, *Jekyll* v. *Wade*, 8 Gr. 363; *Hickman* v. *Lawson*, *Ib.* 386; and all the arbitrators making the award should execute it together, the execution of it by one at one time, and by another at another time, will render it invalid: *Nott* v. *Nott*, 5 O. R. 283. So, also, the award may be invalidated by the arbitrators taking evidence in the absence of one of the parties: *Whitley* v. *McMahon*, 32 C. P. 453; or by their receiving communications *ex parte* from either party after the evidence is closed: *Herring* v. *Napanee, Tamworth and Quebec Ry.*, 5 O. R. 349. But it is only when the submission is by rule of Court, or can be made a rule of Court, or has the effect of a rule of Court, that the High Court has jurisdiction to set aside an award or motion: *Russell Arb.*, 5th Ed. 648; *Re Horton*, 45 U. C. Q. B. 141; *Credit Valley Ry. Co.* v. *Great Western Railway Co.*, 4 App. R. 532; but see *Rhodes* v. *Airedale Drainage Commissioners*, L. R. 1 C. P. D. 402. Here no provision is made for making the submission a rule of any Court. The only remedy of any party dissatisfied with an award made under this section would be by action: *Greenhill* v. *Church*, 3 Rep. Ch. 49; *Hamilton* v. *Bankin*, 3 D. G. & Sm. 782. As to grounds on which an award can be impeached, see *Russell Arb.* 5th Ed. 660, 703; *Story's Eq. Juris.* 12th Ed., ss. 1450-8; *Bateman* v. *Boynton*, L. R. 1 Chy. 359; *Grant* v. *Eastwood*, 22 Gr. 563. The mistake of an arbitrator as to the legal effect of his finding, is no ground for setting aside an award: *Greenwood* v. *Brownhill*, 44 L. T. N. S. 47.

How award may be impeached.

For form of appointment of arbitrator, see Appendix. Secs. 14, 15.

(*g*) "*Or if the arbitrators appointed.*" It is not clear whether these words are confined to the two arbitrators appointed by the parties themselves, or whether they include the case of one arbitrator appointed by one of the parties, and the other by a County Judge. If the words are restricted to arbitrators appointed by the parties, then whenever one of the arbitrators is appointed by the Judge for a party making default, neither the County Judge nor the arbitrator appointed by him would appear to have power to appoint a third arbitrator, and in such a case an application to the court to appoint a third arbitrator under R. S. O. c. 53, s. 39, might be necessary : see *Malloch* v. *Grand Trunk Ry.*, 6 Gr. 348. It may, however, be found that an arbitrator appointed by the Judge for one of the parties has, by necessary implication, all the powers of an arbitrator chosen by the parties themselves, including the right of joining in the appointment of a third arbitrator, (see *R. S. O.* c. 53 s.s. 39, 41 ; but see *In re Gifford & Bury*, 20 Q. B. D. 368). Umpire, or third arbitrator, appointment of, how made.

(*h*) "*In which the lands, etc., are situate.*" When the lands subject to the lien are partly in one county and partly in another, the Judge of neither county would appear to have jurisdiction.

15. During the continuance of a lien (*a*) no portion of the property or machinery affected thereby, shall be removed to the prejudice of the lien; and any attempt at such removal may be restrained by application to the County Court or the Judge thereof, or the High Court respectively, according as the claim is under or over the sum of $200 (*b*). R. S. O. 1877, c. 120, s. 22. Property affected by the lien not to be removed.

Section 15.

Time within which lien continues.

(*a*) "*During the continuance of a lien.*" A lien if unregistered before the expiration of thirty days from the completion of the work or the delivery of the materials, will cease, unless within that time proceedings have been instituted by the lien-holder, or some other lien-holder of the same class, to realize the lien, and a certificate of such proceedings have been registered in the proper registry office, (see *section* 22); and when the action is commenced by another lien-holder of the same class the lien will cease, if the claim is not filed in the action within thirty days after its commencement, (see *section* 30 s.s. 1). A registered lien ceases at the expiration of ninety days from the completion of the work, or delivery of the materials, or the expiry of the period of credit, unless proceedings are in the meantime commenced and a certificate thereof registered, (see *section* 23).

Actions for injunctions, to restrain removal of property, or machinery, in what court to be brought.

(*b*) "*According as the claim is under or over the sum of $200.*" It is not clear from the Act whether the words "the claim" are intended to apply to the individual claim of the lien-holder seeking relief, or whether they refer to the amount claimed to remain due from the "owner" for the satisfaction of the claims of all lien-holders of the same class as that to which the applicant belongs. The latter would seem to be the real sum in question where the suit is brought by a lien-holder not only to restrain the removal of property, but also to enforce payment of his lien (see *section* 30). But, when the action is brought simply for the purpose of restraining the removal of property, possibly the amount of the individual claim of the plaintiff would determine the question of jurisdiction. The jurisdiction of the County Court, for the purpose of this section, is limited to $200. The result of the section appears to be, that, in all cases where the claim is under $200, the application for an injunction to restrain removal of property subject to the lien should be made in the County Court, and in all other cases in the High Court, (see *post*, *section* 28, note *a*).

Section 16.

Claim may be registered.

16. (1) A claim of lien applicable to the case, may be registered (*a*) in the registry office of the registry division in which the land is situate (*b*), and shall state (*c*)—

(A) The name and residence of the claimant and of the owner of the property to be charged (*d*), and of the person for whom and upon whose credit the work is done or materials or machinery furnished, and the time or period within which the same was, or was to be, done or furnished;

(B) The work done or materials or machinery furnished;

(C) The sum claimed as due, or to become due;

(D) The description of the land to be charged; (*e*)

(E) The date of expiry of the period of credit agreed to by the lien-holder for payment for his work, materials or machinery, where credit has been given.

Affidavit of verification may be made by agent or assignee.

(2) The claim may be in one of the forms given in the schedule in this Act, and shall be verified by the affidavit (*f*) of the claimant, or of his agent (*g*) or assignee (*h*) having full knowledge of the matters required to be verified, and the affidavit of an agent or assignee shall state he has such knowledge. R. S. O. 1877, c. 120, s. 4 (1, 2); 47 V. c. 18, ss. 2, 3.

Section 16.

Registration of lien.

(*a*) "*May be registered.*" Although the registration of the claim is not necessary to create a lien, it is essential to its continuance after the expiration of thirty days after the work has been completed, or the materials or machinery furnished, (see *section* 21), unless in the meantime a suit has been commenced to enforce it by the lien-holder, or some other lien-holder of the same class, and a certificate of *lis pendens* registered, (see *section* 22). If the period of credit between the "owner" and the "contractor," or any other lien-holder and his debtor, extend beyond the time limited by sections 20 and 21 for registering a lien, and the lien be not registered, the omission to register will have the effect of defeating the lien: for where the period of credit has not expired, no suit can be brought to enforce the lien: *Burritt* v. *Renihan*, 25 Gr. 183; *Neill* v. *Carroll*, 28 Gr. 34; 339. And in the case of liens for wages. registration within the period mentioned in section 20 is essential, in order to entitle the lien-holder to the benefit of the provisions of sections 6 and 9. Registration of the lien is also essential where the interest of a lessor is sought to be charged under section 5, s.s. 2, (see *ante*, p. 28, note *f*).

Where registration before action is necessary.

By whom liens may be registered.

A claim may be registered not only by the person doing the work, or furnishing the material, but also by his assignee, where the assignment is in writing; and in such a case the assignee is to make the affidavit verifying the claim, (see *sections* 25, 16; *Grant* v. *Dunn*, 3 O. R. 376).

Application of *Registry Act* to liens.

The intention of the Act appears to have been that the conflicting claims of unregistered lien-holders, and persons claiming under registered instruments, should be determined without regard to *The Registry Act;* but the course of judicial decision has run counter to this idea, (see *ante*, p. 8, *et seq.*); and though this Act says *The Registry Act* is not to apply to liens, the courts have virtually said that *The Registry Act* does apply to liens, and, in the present state of the authorities, unless a lien is registered, there is danger that it will lose

Section 16.

priority over subsequent purchasers and mortgagees for value without notice, (see *Wanty* v. *Robins*, 15 O. R. ; *Peterkin* v. *Rose*, 13 S. C. R. 677), whose conveyances or mortgages are first registered. If therefore a lien-holder desire to preserve his priority over subsequent grantees or mortgagees, it seems, in the present state of the authorities, advisable in all cases to register his lien promptly.

Persons claiming under prior registered deeds, how made parties.

Where priority is claimed by the lien-holder, against a prior registered mortgage or conveyance, it would not seem to be proper to add the person claiming under such mortgage or conveyance as a party in the Master's office ; on the contrary, he should be made an original defendant, and the grounds upon which the plaintiff claims priority should be alleged, (see *Reinhart* v. *Shutt*, 15 O. R.).

Priority, as between lien-holder and attaching creditor.

A difference of opinion appears to prevail as to whether an execution creditor can, by procuring an attaching order, against the "owner," as a garnishee, obtain priority over mechanics who have previously acquired liens, even though such liens have not been registered at the time the garnishee order is obtained, and before the time allowed for registering such lien had expired. The better opinion appears to be that he cannot: *Lang* v. *Gibson*, 21 C. L. J. 74, (see, however, *McCully* v. *Ross*, 22 C. L. J. 63, and see remarks on these two cases 22 C. L. J. p. 75).

Registration of lien, where lands situate in different divisions.

(*b*) "*Is situate.*" Where the land affected by the lien is partly in one registration division, and partly in another, the registration should be made in both divisions. Where the land is registered under *The Land Titles Act*, the claim must be lodged with the Master of Titles, (see *R. S. O.* c. 116, s. 55).

(*c*) "*Shall state.*" The word "shall" is imperative (see *R. S. O.* c. 1, s. 8, s.s. 2).

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"Owner," how to be described in registered lien.

(*d*) "*Owner of the property to be charged.*" The owner here spoken of is the person against whose interest in the land the lien is to be enforced, not necessarily the owner of the fee, (see *ante*, s. 2, *note c*). Where the "owners" were a corporation aggregate, the misnomer of the corporation in the registered claim was held to invalidate the registration, as against a subsequent mortgage: *Boult* v. *Wellington Hotel Co.*, before Blake, V. C., at Guelph, 1st Oct., 1878. It has, however, been held to be sufficient if the name and address of the person who was the "owner" of the property at the date the liability for the lien was incurred is stated, and that a subsequent assignee is bound, even though he acquires title under a conveyance registered before the lien and his name does not appear in the registered lien: *Makins* v. *Robinson*, 6 O. R. 1: see *post*, section 17, note *b*: see however *McVean* v. *Tiffin*, 13 App. R. 1; *Hynes* v. *Smith*, 27 Gr. 150; *Reinhart* v. *Shutt*, 15 O. R. .

Description of land in registered lien.

(*e*) "*The description of the land to be charged.*" Care must be taken to describe the land correctly. Where it forms part of a sub-division according to a registered plan, it must be described according to that plan. General descriptions such as "part of lot A," without specifying distinctly the part intended, should be avoided.

Affidavit verifying lien, how and by whom to be sworn.

(*f*) "*Verified by the affidavit.*" For form of affidavit, see the schedule to this Act. Where the affidavit referred to the claim as "the paper annexed, marked A," and the paper annexed had no such mark on it, but was proved to be the paper prepared for registration, and in that condition annexed to the affidavit, it was held that the omission to mark it "A" did not invalidate the registration: *Currier* v. *Friedrick*, 22 Gr. 243. The affidavit may be sworn before any commissioner for taking affidavits in the county where the affidavit is sworn: *R. S. O.* c. 62, s. 12. A notary public does not appear authorized to take such affidavits, (see *R. S. O.* c. 153, s. 4).

(*g*) "*Or his agent.*" Formerly the affidavit of an agent was insufficient: *Grant* v. *Dunn*, 3 O. R. 376.

(*h*) "*Or assignee.*" It would seem that it is only when the assignee claims under a written assignment that he is competent to claim a lien, (see *section* 25).

Claims for wages may be combined.

17. A claim for wages (*a*) may include the claims of any number of mechanics, labourers, or other persons aforesaid, who may choose to unite therein. In such case each claimant shall verify his claim by his affidavit, but need not repeat the facts set out in the claim; and an affidavit substantially in accordance (*b*) with Form 4 in the schedule to this Act, shall be sufficient: 45 V. c. 15, ss. 8, 10.

Other claims to be registered separately.

(*a*) "*A claim for wages.*" It is only in claims for wages that several lien-holders may join together in one claim; in all other cases each lien-holder must register a separate claim, confined to his own individual demand.

Compliance with statutory form of claim, how far essential.

(*b*) "*Substantially in accordance.*" In *Makins* v. *Robinson*, 6 O. R. 1, an objection was taken to a claim, on the ground that the name of the person who was the "owner" at the time the claim was registered, was not mentioned in it. The lien-holder in that case was employed by Robinson & Elliott, who, after the lien had attached, had sold their interest to Poussette. The names of Robinson & Elliott alone appeared in the registered claim as "owners." On this point Ferguson, J., said, "It was urged for the defence that the registration of the lien was not good, because the name of Poussette, who was the 'owner' at the time, was not mentioned in it. On this subject I have looked at some of the American cases. In the case of *Jones* v. *Shawhan*, 4 Watts & Serg, at p. 262, Gibson, C. J., says: 'But as the claim is against the build-

Omission of name of "owner," effect of.

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ing instead of the person, and as the name is only a circumstance of description to specify the property and give notice to purchasers, entire accuracy in regard to the ownership may not be indispensable ; the more so as the statute expressly requires no more than the name of the reputed owner, and it might be sufficient to file it against the past, or present one. It is certain, however, that the name of the owner when the building was commenced satisfies the requirements of the law.'" Ferguson, J., after referring to the language of section 2, s.s. 3, and section 16, proceeds, "Yet I am of the opinion that the reasoning in the case to which I have referred applies, especially when I look at the date of the conveyance to Poussette, and the allegation of the plaintiff that he did not know anything of it, and I am of opinion that this alleged defect is not fatal, although it has been said that the statute relative to mechanics' liens, being in derogation of the common law, should be strictly complied with."

Affidavit by unauthorized persons.

The making of the affidavit verifying the claim by a person not authorized by the statute to make it has been held a fatal defect : *Grant* v. *Dunn*, 3 O. R. 376.

Registration of claims.

18.—(1) The registrar, upon payment of his fee, shall register the claim, so that the same may appear as an incumbrance (*a*) against the land therein described. R. S. O. 1877, c. 120, s. 5 ; 47 V. c. 18, s. 4, *part*.

Fee.

(2) The fee for registration shall be twenty-five cents ; if several persons join in one claim, the registrar shall have a further fee of ten cents for every person after the first. 45 V. c. 15, s. 11.

Mode of registration.

(3) The registrar shall not be bound to copy in any registry book any claim or affidavit, but he

shall number each claim, and shall insert in the alphabetical and abstract indexes (*b*) the like particulars as in other cases; he may describe the nature of the instrument as "Mechanics' Lien." 45 V. c. 15, s. 11. Secs. 18, 19.

(*a*) "*So that the same may appear as an incumbrance.*" The omission of a registrar to index a registered instrument, will not deprive it of its priority as against a subsequent purchaser, or mortgagee, for value, without notice: *Lawrie* v. *Rathbun*, 38 U. C. Q. B. 255. Effect of default of registrar.

(*b*) "*And shall insert in the alphabetical and abstract indexes.*" The omission of a registrar to comply with this direction, will not deprive the lien of its priority, as against a subsequent purchaser, or mortgagee, for value, without notice of it: *Lawrie* v. *Rathbun*, *supra*.

19. Where a claim is so registered, the person entitled to the lien shall be deemed a purchaser *pro tanto* (*a*), and within the provisions of *The Registry Act*, but except as herein otherwise provided (*b*), *The Registry Act* shall not apply (*c*) to any lien arising under this Act. R. S. O. 1877, c. 120, ss. 4 (3), 26. *Registry Act* to apply. *Rev. Stat.* c. 114.

(*a*) "*Shall be deemed a purchaser pro tanto.*" The benefit of the provisions of *The Registry Act* is confined to persons who are purchasers or mortgagees, for value, without actual notice, (see *The Registry Act*, ss. 76, 82). In favour of such persons, by registration of the instruments under which they claim, priority is secured over other instruments prior in date but not registered, and of which they have no actual notice. Lien-holder a purchaser.

Section 19.

A person who registers a mechanics' lien is, under this section, therefore, entitled to claim priority over an unregistered mortgage or other conveyance made by the owner, previous to the registration of such lien, and of which the lien-holder had not actual notice. A lien-holder is, therefore, placed in a better position than an execution creditor, who has no better right than his execution debtor: *Russell* v. *Russell*, 28 Gr. 419.

Claim of lien-holder superior to that of execution creditor.

Registration of lien, effect of.

Prior to registration, a mechanics' lien is valid, and binding on the land, and it would seem to be the intention of the Act that the registration of the lien, within the time prescribed by sections 20 and 21, should not have the effect of postponing the lien to the date of its registration, but rather of continuing the charge created by the lien, as from the date at which it originally attached. If this be the correct interpretation of the Act, then, in order to postpone a registered lien-holder to a prior unregistered instrument, it would be necessary to show that the lien-holder had actual notice of the prior unregistered instrument some time previous to his acquiring his lien, and not merely previous to his registering it.

Notice to lien-holder of prior unregistered claims, effect of.

For instance, a mechanic may acquire a lien by virtue of commencing certain work, (see *section* 4), and after the commencement of the work, and before he has registered his lien, he may acquire actual notice of an unregistered mortgage, his subsequent registration of his lien would not deprive him of the priority he had acquired before he had notice of the lien. It is true that it has been held, in *Hynes* v. *Smith*, 8 P. R. 73; 27 Gr. 150; that a mortgage created subsequently to the acquisition of a lien, but registered prior to the lien, was entitled to priority over the latter. That decision, however, is not very satisfactory, as the two judges who arrived at that conclusion seem to have overlooked the effect of sections 5 and 2, s.s. 3, which provide that the lien is to bind not only the interest of the "owner," but also of all persons claiming under him whose interests are acquired subsequently to the

lien; and also this section, now under consideration, which declares *The Registry Act* is not to apply to liens except as otherwise provided. Proudfoot, J., who dissented from the other two members of the court, alone considered the effect of these sections. It is, therefore, open to doubt whether the reasons given by the majority of the Court for the decision in the case of *Hynes* v. *Smith* are correct. In *McVean* v. *Tiffin*, 13 App. R. 1, it was held that a mortgagee, who had registered his mortgage prior to a mechanics' lien being acquired, but who did not actually advance the money secured thereby until after the acquisition of the lien, was, nevertheless, not a subsequent incumbrancer to the lien-holder. In this case, too, the effect of sections 5, and 2, s.s. 3, and the section now under consideration, does not appear to have received the attention of the court. It is possible, that these cases may be upheld on other grounds than those assigned in the judgment of the court: see *ante*, p. 9.

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Hynes v. *Smith*, *McVean* v. *Tiffin*, effect of.

(*b*) "*Except as herein otherwise provided.*" The exception referred to is that contained in section 22, which provides that unless a lien be registered within the time prescribed by sections 20 and 21, it shall cease to exist. Until the time prescribed by those sections has expired, the lien is valid and binding without registration as against the "owner" with, or under whom, the contract was made, in respect of which the lien arises; and if an action be commenced within that time to enforce the lien, and a certificate thereof be registered, then no further registration of the lien is necessary under the Act. But as against assignees of the person who was the "owner" at the time the contract was made in respect of which a lien exists, registration appears to be necessary in order to preserve the lien's priority, which may, in the present state of the authorities, be defeated by the prior registration of the instruments under which such assignees claim without actual notice of the lien: see *McVean* v. *Tiffin*, 13 App. R. 1; *Wanty* v. *Robins*, 15 O. R.

How far *Registry Act* affects lien-holders.

Section 19.

Effect of cases as to application of *Registry Act* to liens.

(c) "*The Registry Act shall not apply.*" The effect of this provision appears to be, that so far as the claims of lien-holders are concerned, either in relation to other liens or registered instruments, they are to be dealt with as if *The Registry Act* did not exist. It must be admitted, however, that the current of legal decision appears virtually to have abrogated this clause in the Act: see *McVean* v. *Tiffin*, 13App. R. 1; *Hynes* v. *Smith*, 27 Gr. 150; *Reinhart* v. *Shutt*, 15 O. R.

Principle on which *Registry Act* based.

The principle of *The Registry Act* is, that by registration of an instrument, notice of it is given to all persons dealing with the land affected thereby, and registered instruments obtain priority according to the order of their registration, and are entitled to priority over prior unregistered claims, unless there be actual notice brought home to the person claiming under the prior registered instrument prior to its registration, of the existence of the prior unregistered claim: *R. S. O.* c. 114, s. 82; *Peterkin* v. *Rose*, 13 S. C. R. 677. This principle, it would seem, was not intended to apply to mechanics' liens. Under section 4 a mechanics' lien is created without registration, and it binds the interest not only of the "owner," but also of all persons claiming under him whose rights are acquired after the work in respect of which the lien is claimed is commenced, or the materials or machinery have been commenced to be furnished, (*sections* 5, 2, s.s. 3). And it does not appear to have been intended that the lien thus created, should be defeated by the prior registration of any transfer of interest, absolutely, or by way of mortgage, executed by the "owner," after the lien had once attached, provided the lien were duly registered within the time prescribed by sections 20, 21, or an action brought, and a certificate thereof registered, as provided by sections 22, 23, (see *ante*, p. 8).

Its non-application to liens.

If *Registry Act* does not apply to liens, principle on which conflicting

If *The Registry Act* does not apply to mechanics' liens under the circumstances above mentioned, it seems to involve the proposition that conflicting claims between registered mortgagees, and lien-holders, must be adjudicated upon, and

their rights adjusted, as though *The Registry Act* had not been passed, (see *R. S. O.* c. 114, s. 35 ; *Latch* v. *Bright*, 16 Gr. 653), and the courts, in dealing with such liens, should be governed by the well-known maxims of equity as to notice, and as to a conflict between legal rights, and between legal rights on the one hand, and equitable rights on the other. Thus, as between persons having conflicting legal rights, the maxim, "*qui prior est in tempore potior est in jure*," should prevail ; as between a legal and equitable claimant, the maxim that "Where the equities are equal the law must prevail" should hold good. Thus, a mechanic who had notice of the existence of a vendor's lien for unpaid purchase money before commencing his work, would not be entitled to priority over it : see *Phillips*, ss. 243, 244. But notice that work is going on upon land is not necessarily actual notice of any lien for such work : see *Douglas* v. *Chamberlain*, 25 Gr. 288 ; *Richards* v. *Chamberlain*, *Ib.* 402 ; *Graham* v. *Williams*, 9 O. R. 458.

Secs. 19 rights should be dealt with.

20.—(1) Where the lien is for wages under sections 6 or 9, (*a*), the claim may be registered, (*b*)—

Time for registration of claim for wages.

(A) At any time within thirty days after the last day's labour (*c*) for which the wages are payable, or

(B) At any time within thirty days after the completion of the construction, alteration or repair of the building or erection, or after the erecting or placing of the machinery, in or towards which, respectively, the labour was performed and the wages earned, but so that the whole period shall not exceed sixty days (*d*) from the last day's labour aforesaid.

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(2) Such lien (*e*) shall not be entitled to the benefit of the provisions of sections 6 and 9 after the said respective periods, unless the same is duly registered before the expiration of the said periods so limited. 45 V. c. 15, s. 6.

(3) Such lien shall have the same priority (*f*) for all purposes after as before registration. 50 V. c. 20, s. 1.

Section 20 does not create right of lien, but gives additional privileges.

(*a*) "*Where the lien is for wages under sections 6 or 9.*" Liens for wages are not created by sections 6 or 9, but only certain additional and preferential privileges are conferred by those sections on liens for wages for thirty days or less; and it would seem that it is only where these preferential privileges are sought by the lien-holder that it is necessary that the provisions of this section as to registration should be complied with. Where the lien is for wages, but the lienor merely claims the ordinary rights of a lien-holder, it would appear to be sufficient to comply with the provisions of section 21 as to registration. The words "where the lien is for wages," therefore, do not include all liens for wages, but only those for thirty days wages or less where the benefit of sections 6 or 9 is claimed.

Taking promissory note when not a waiver of lien.

(*b*) "*May be registered.*" The mechanic's taking a promissory note for his claim, which matures and is dishonoured before the period for registration has expired, is no bar to the registration of the lien: *Lindop* v. *Martin*, 3 C. L. T. 312.

Thirty days, how computed.

(*c*) "*After the last day's labour.*" These words would seem to indicate that the last day's labour is not to be reckoned in the computation of the thirty days: see *Kerr* v. *Bowie*, 3 U. C. L. J. 110; *Scott* v. *Dickson*, 1 P. R. 366; *Montgomery* v. *Brown*, 2 U. C. L. J. N. S. 72. Where the last day falls

on a statutory holiday, the time will be extended to the day next following which is not a holiday : see *R. S. O.* c. 1, s. 8, s.s. 17. Section 20.

(*d*) "*So that the whole period shall not exceed sixty days.*" It is this provision as to the sixty days which seems to constitute the real difference between the provisions of this section and section 21 as to registration. The sixty days from the last day's labour is the ultimate period within which a lien for wages can be registered where the privileges conferred on such liens, by sections 6 and 9, are claimed. Liens for wages, sixty days for registration.

(*e*) "*Such lien.*" That is to say, a lien for thirty days' wages or less.

(*f*) "*Shall have the same priority.*" A palpable blunder in this section, as originally passed, has been corrected in the revision. The section originally read that the lien shall have the same priority "before as after registration." It may be doubted whether this section, as it now stands, is anything more than a declaration of what the law already was before it was passed ; and although this section is confined in terms to liens for wages for thirty days or less, it is questionable whether the effect of the statute is not to give to all liens, irrespective of whether they are for wages, the like privilege. It would seem unlikely that the statute intended to give a lien-holder, without registration, a priority over persons dealing with the owner subsequently to the accrual of his lien, as it apparently does by section 2, s.s. 3, s. 19, and to take that priority away upon the lien-holder subsequently registering his lien within the period prescribed by section 21. The cases of *Hynes* v. *Smith*, 27 Gr. 150, and *McVean* v. *Tiffin*, 13 App. R. 1, which have been previously referred to, *ante*, p. 10, however, render this point by no means free from doubt ; and it is open to argument that, there being this express provision in favour of a particular class of liens, it is not the intention of the statute to confer the same privilege Priority of liens.

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on the liens not included in the specified class, (see *Reinhart* v. *Shutt*, 15 O. R.). But, as has been already pointed out, *ante*, p. 10, the priority of a lien-holder was not before the passing of this section lost merely by its being subsequently registered, but by reason of the prior registration of some conflicting claim, and it seems doubtful whether this subsection really accomplishes anything : all that it says, is, that the lien is to have the same priority "after as before registration." What priority would it have before registration over a subsequent conveyance or mortgage for value, without notice, registered prior to the lien ? : if *McVean* v. *Tiffin*, *supra*, be correct, none ; consequently, the subsequent registration of the lien will not give it any priority.

Time for registering claim not arising under s. 6.

21. In other cases (*a*) the claim may be registered (*b*) before or during the progress of the work, or within thirty days from the completion thereof, or from the supplying or placing the machinery (*c*). 45 V. c. 15, s. 7.

(*a*) "*In other cases.*" That is, in all cases except the case of liens for wages for thirty days or less, where the privileges of sections 6 or 9 are claimed.

Registration of lien, necessary to secure priority.

(*b*) "*May be registered.*" If the cases of *Hynes* v. *Smith*, 27 Gr. 150, and *McVean* v. *Tiffin*, 13 App. R. 1, are a correct exposition of the statute, it would seem, that in order to secure the lien-holder's priority, as against persons dealing with the "owner" subsequently to the commencement of the work, the lien must be registered before the instrument under which the owner's subsequent vendee or mortgagee claims title, otherwise the lien-holder will be postponed thereto, unless the prior registered transferee had actual notice of the lien before the registration of his deed : *Wanty* v. *Robins*, 15 O. R. . The accuracy of the reasons given

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for those decisions appears to be open to some doubt, (see *Makins* v. *Robinson*, 6 O. R. 1). But even though a subsequent grantee or mortgagee of the "owner" may not be able to acquire priority over a lien-holder, merely by prior registration of the instrument under which he claims, yet where he has acquired a legal title, and has had no actual knowledge of the lien, it is possible (apart altogether from *The Registry Act*) that he could, under such circumstances, successfully claim priority over the lien.

Taking security, how far a waiver of right of lien.

A mechanic's taking a promissory note, which matures and is dishonoured before the expiration of the period limited by this section for registering a lien, is no waiver of his right to register a lien: *Lindop* v. *Martin*, 3 C. L. T. 312; *Makins* v. *Robinson*, 6 O. R. 1; and see *VanCourt* v. *Bushnell*, 21 Ill. 624. But the taking of a security, inconsistent with the right of lien, is a waiver of the lien: see *Kinzey* v. *Thomas*, 28 Ill. 502; *Benneson* v. *Thayer*, 23 Ill. 374; or where a negotiable note has been taken for the debt, and has been negotiated: *Clement* v. *Newton*, 78 Ill. 427; *Croskey* v. *Corey*, 48 Ill. 442.

Thirty days, how computed where goods supplied from time to time.

(c) "*Or from supplying or placing the machinery.*" These words appear to be intended to include not only "machinery," but all materials. But where goods were furnished from time to time as required, not under any contract, it was held each supply was a separate and distinct transaction: *Chadwick* v. *Hunter*, 1 Man. R. 39. When materials or machinery are delivered under a single contract piecemeal, it would seem that the thirty days in which the action must be brought, or the lien registered, would not commence to run until there had been a complete delivery of all the materials, or machinery, included in the particular contract. Thus, where goods are furnished from day to day by a store-keeper for the purposes of a building, the thirty days run from the date of the furnishing of the last item: *Lindop* v. *Martin*, 3 C. L. T. 312.

Secs. 21, 22.

But where a material-man has a single contract for the supply of materials to a contractor who has entered into separate and distinct contracts with several "owners," the time for filing a lien by such material-man against any one of the "owners," is not to be measured with reference to the duration of the deliveries under the contract between the material-man and the contractor, but by the completion of the work by the contractor for the "owner" against whom the lien is claimed: *Re Moorehouse & Leak*, 13 O. R. 290.

Remedying defects, time not extended by.

Where the work has been done, or the materials have been furnished, and accepted by the "owner," the existence of some slight defect, which is subsequently remedied by the contractor, will not be deemed to extend the time for registering the lien until thirty days from the time the defect is remedied, even though the work or materials were accepted on the understanding that the defect was to be remedied: *Neill* v. *Carroll*, 28 Gr. 30 (affirmed on rehearing, Blake, V.C., diss.) *Ib.* 339; *Makins* v. *Robinson*, 6 O. R. 1; *Kelly* v. *McKenzie*, 1 Man. R. 169. But where the completion of the work was delayed, its subsequent completion after a long delay was held to extend the time for registering the lien: *Irwin* v. *Beynon*, 4 Man. R. 10.

Goods supplied to "contractor" on running account, lien for.

Where a material-man supplied goods to a contractor on credit, and charged them in a running account, and the contractor received moneys from time to time from the "owner," which he paid over to the material-man, and no appropriation of payments was made by either the "owner" or the "contractor," and the material-man credited his receipts generally in account with the "contractor," and filed a lien for the balance, including in such lien the latest items of his account, it was held that he was entitled to the lien claimed: *Lindop* v. *Martin*, 3 C. L. T. 312.

When unregistered lien shall cease.

22. Every lien which has not been duly registered (*a*) under the provisions of this Act shall

absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof, unless in the meantime (*b*) proceedings are instituted to realize the claim (*c*) under the provisions of this Act, and a certificate thereof (*d*) (which may be granted by the Court or a Judge (*e*) before whom or in which the proceedings are instituted), is duly registered (*f*) in the registry office of the registry division wherein the lands in respect of which the lien is claimed are situate. R. S. O. 1877, c. 120, s. 20. Section 22.

(*a*) "*Not been duly registered.*" The registration of a lien for work must be made before or during its performance or within thirty days after its completion (*section* 21); and in the case of a lien for wages, where the additional privileges attached to such liens are claimed, the lien must be registered at latest within sixty days from the performance of the last day's labour in respect of which such wages are claimed, (*section* 20); and a lien for materials must be registered within thirty days after they have been furnished or placed upon the land, (*section* 21). Where the period of credit agreed to by the mechanic extends beyond thirty days after the completion of the work, or the furnishing of the materials, the registration of the claim is absolutely necessary in order to preserve the lien, because no action can be brought to enforce the lien until the period of credit has expired: *Burritt* v. *Renihan*, 25 Gr. 183; *Neill* v. *Carroll*, 28 Gr. 30, *Ib.* 339. Registration of lien, when to be made.

(*b*) "*Unless in the meantime.*" It is not essential to the preservation of the lien that the proceedings should have been instituted by the lien-holder himself; it will be suffi- Action to enforce lien, time for bringing.

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cient if they have been instituted by some other lien-holder of the *same class*, (see *section* 30: *Bunting* v. *Bell*, 23 Gr. 584; *Hovenden* v. *Ellison*, 24 Gr. 448; *McPherson* v. *Gedge*, 4 O. R. 246). But an action by one lien-holder will not preserve the liens of other lien-holders of the same class longer than thirty days after the issue of the writ, unless, in the meantime, such other lien-holders file their claims in the action in the office from whence the writ issued, (*section* 30, s.s. 1). And an action by one lien-holder would not have the effect of reviving the lien of another lien-holder of the same class which had expired under this section before the action was commenced. In order to entitle a lien-holder to maintain an action to enforce his lien, the period of credit (if any) between the "contractor" and "owner" must have expired: *Burritt* v. *Renihan*, 25 Gr. 183; and it would seem that where the action is brought by a "sub-contractor," the period of credit (if any) between him and the "contractor" or "sub-contractor" by whom he was employed must also have expired.

This section applies to every claim for relief under the Act. Where a lien-holder filed a bill and obtained a decree to enforce his lien as against the "owner," it was held he could not afterwards, and after the lapse of the time for bringing an action, file another bill against a prior mortgagee to obtain relief under section 5, s.s. 3: *Bank of Montreal* v. *Haffner*, 29 Gr. 319; 10 App. R. 592, S. C., *sub nom. Bank of Montreal* v. *Worswick*, Cass. Dig. 289. By analogy to the practice in mortgage actions for sale, or foreclosure, it has heretofore been customary not to add subsequent incumbrancers as parties defendant to the writ; but to add them as parties in the Master's office. It must be remembered, however, that even in mortgage actions, all parties interested as subsequent incumbrancers had formerly to be made parties to the bill, and that this practice continued until the General Orders of 1858, (see *Chy. Ord.* 441-4) altered it. These Orders, however, are in terms confined to mortgage actions,

Subsequent incumbrancers should be made original parties.

in which there is no thirty days' limit for commencing the action, as is the case in actions to enforce mechanics' liens. The principle of *Bank of Montreal* v. *Haffner* seems to require that actions to enforce mechanics' liens must be commenced as against all parties against whom relief is claimed within the time prescribed by sections 22, 23. As regards parties added in the Master's office, the action is commenced only from the time they are added, and not from the date of the issue of the writ of summons : see *infra*, note *c*. Section 22.

(*c*) "*Proceedings are instituted to realize the claim.*" The proceedings must be instituted against the proper parties, within the prescribed time. Where parties are added by amendment after the action is commenced, the action as against such parties does not relate back to the issue of the writ, but is only deemed to have been commenced as against them at the time they are added, (see *Shaw* v. *Cunningham*, 12 Gr. 101 ; *MacDonald* v. *Wright*, 14 Gr. 285-6 ; *Dumble* v. *Larush*, 25 Gr. 552 ; 27 Gr. 187). Action should be commenced against all parties interested within prescribed time.

The "owner," *i.e.*, the person whose interest in the land in question is sought to be sold, must always be made a defendant. And where the person with whom the contract was made has, after the lien attached, sold, or mortgaged, or otherwise transferred, or incumbered his interest, in the land in question, it would seem proper to make the transferee also a defendant by the writ. Where such subsequent transferee has registered the instrument under which he claims, prior to the lien, it has been held he cannot be added as a subsequent incumbrancer in the Master's office : *Hynes* v. *Smith*, 27 Gr. 150 ; *McVean* v. *Tiffin*, 13 App. R. 1 ; *Re Craig*, 3 C. L. T. 501 ; *Reinhart* v. *Shutt*, 15 O. R. ; and see *ante*, p. 8, *section* 2, note *e*. If, notwithstanding the prior registration of a subsequent transfer by the owner, the lienholder claims that his lien is a prior charge to that of the transferee, that question can only be raised by making the transferee an original defendant. Parties to actions to enforce liens.

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Where the action is brought by a sub-contractor, the contractor, or sub-contractor, by whom the plaintiff was employed, is also a necessary defendant.

Prior mortgagee.

Where relief is claimed against a prior mortgagee, under section 5, s.s. 3, such mortgagee must also be made an original defendant: *Bank of Montreal* v. *Haffner*, 29 Gr. 319; 10 App. R. 592; S. C. *sub nom. Bank of Montreal* v. *Worswick*, Cass. Dig. 289.

Certificate *lis pendens*,

(*d*) "*A certificate thereof.*" This means a certificate that the proceedings have been commenced. The certificate should show the names of the parties, plaintiff and defendant, to the action, and should also accurately describe the land over which the lien is claimed as it is described in the proceedings.

For Form of Certificate of *lis pendens*, see Appendix.

How issued.

The certificate in the High Court may be under the seal of the court, or the seal of office (if any) of any officer issuing the same: *R. S. O.* c. 114, s. 47. Where the seal of a Court of Record is affixed to the certificate, it proves itself, and can be registered without affidavit, (see *R. S. O.* c. 114, s. 46). But where the certificate is not under the seal of a Court of Record, *semble*, an affidavit of attestation is necessary. Division Courts are not Courts of Record, (see *Division Courts Act*, *R. S. O.* c. 51, s. 7; but see *Corsant* v. *Taylor*, 10 C. L. J. 321). An affidavit would also seem necessary where the certificate is issued under a seal of office, not being the seal of the court.

(*e*) "*By the Court or a Judge.*" These words are not intended to require a special application to the Court, or a Judge, for the certificate. Where the action is commenced by writ, the certificate is issued and signed by any of the officers mentioned in *R. S. O.* c. 114, s. 47, in the same way as a certificate of *lis pendens* is issued in any other action.

Where the action is commenced by writ in the County Court, the Clerk of the Court would seem to be the proper officer to issue and sign and seal the certificate, but *R. S. O.* c. 114, s. 47, makes no express provision for the issue of such certificates from County Courts: see, however, *R. S. O.* c. 47, s. 28. But where the proceedings are, by way of summary application to the Judge of a County or Division Court, under section 28, the certificate should probably be granted and signed by the Judge to whom the application is made. Secs. 22, 23.

(*f*) "*Duly registered.*" The proceedings must not only have been commenced within the thirty days, but the certificate must have been registered within that period, or the lien will cease. Where the land in question is situate partly in two registration divisions, a certificate of the commencement of the proceedings must be registered in both divisions. Registration of *lis pendens*, time for.

A mistake of the registrar in indexing or omitting to index the certificate will not invalidate its registration: *Laurie* v. *Rathbun*, 38 U. C. Q. B. 255.

It would appear to be a sufficient registration of a *lis pendens* within the meaning of this section, if any action be registered within the prescribed time in which the lien-holder would be entitled to recover his claim: see *Bunting* v. *Bell*, 23 Gr. 584, and per Osler, J., *McPherson* v. *Gedge*, 4 O. R. 264; and see *section* 30.

23. Every lien which has been duly registered (*a*) under the provisions of this Act shall absolutely cease to exist (*b*) after the expiration of ninety days after the work has been completed, or materials or machinery furnished, or wages earned, or the expiry of the period of credit (*c*), where such period is mentioned in the claim of lien filed, unless in the When registered lien shall cease.

Section 23. meantime proceedings are instituted to realize the claim under the provisions of this Act, and a certificate thereof (which may be granted by the Court or Judge (*d*) before whom or in which the proceedings are instituted), is duly registered in the registry office of the registry division wherein the lands in respect of which the lien is claimed are situate. R. S. O. 1877, c. 120, s. 21.

Action to enforce registered lien, time for.

(*a*) "*Which has been duly registered.*" The preceding section, having prescribed the time within which an action must be brought to enforce unregistered liens, the present section prescribes the time within which an action must be brought to enforce a registered lien. By registering the claim within the thirty days after the completion of the work, or furnishing of the materials, an additional period of sixty days is gained for commencing an action to enforce the claim.

Where a contractor, working for several "owners," has but a single contract for the supply of materials with the material-man, the time for the latter filing a lien against any one of the "owners" is not to be measured with reference to the duration of deliveries under the contract between the material-man and the "contractor," but by the completion of the work by the contractor for the "owner" against whom the lien is claimed: *Re Moorehouse & Leak*, 13 O. R. 290.

Lien to cease if not prosecuted or if security inconsistent with right of lien be taken.

(*b*) "*Shall absolutely cease to exist.*" A lien may be put an end to, not only by failure to bring a suit to enforce it and registering a certificate of *lis pendens* within the time limited by this section, but also by the lien-holder accepting security for his debt inconsistent with his right of lien: see *Kinzey* v. *Thomas*, 28 Ill. 502; *Croskey* v. *Carey*, 48 Ill. 442; *Benneson* v. *Thayer*, 23 Ill. 374; *Clement* v. *Newton*, 78 Ill. 427. But

the taking of a promissory note, which is not negotiated and is dishonoured at maturity, is no waiver of the lien: *VanCourt* v. *Bushnell*, 21 Ill. 624.

(*c*) "*Or the expiry of the period of credit.*" The period of credit between the "owner" and "contractor" may expire before that between a "sub-contractor" and the person by whom he is employed; in such a case it would seem that the "period of credit" intended (so far as an action by the "sub-contractor" is concerned) would be the latter period, as until that had elapsed, the sub-contractor would not appear to be in a position to commence an action to enforce his lien: *Burritt* v. *Renihan*, 25 Gr. 183. The existence of an agreement to give credit will not, however, prolong the time for commencing an action, unless it be stated in the registered claim when the period of credit agreed to will expire, (see *section* 24). The action must be commenced, and the *lis pendens* registered, within ninety days. An action by any one lien-holder will keep alive for thirty days the liens of all other lien-holders of the same class, and within such period of thirty days they must file their claims in the action, otherwise they will not be entitled to enforce their claims therein, (see *sections* 24, 30).

Time for bringing action where credit given.

Other lien-holders of same class, when entitled to benefit of action.

(*d*) See *section* 23, note *e*, *supra*.

24. If there is no period of credit, or if the date of expiry of the period of credit is not stated in the claim so filed, the lien shall cease to exist upon the expiration of ninety days after the work has been completed or materials or machinery furnished (*a*), unless in the meantime proceedings shall have been instituted pursuant to section 23 of this Act. 47 V. c. 18, s. 2.

When lien to cease.

Secs. 24, 25.

Acceptance of work subject to remedying a defect, effect of.

(*a*) "*Work has been completed or materials or machinery furnished.*" Where the work has been done, or the materials have been furnished and accepted by the owner, the existence of some slight defect, which is subsequently remedied by the contractor, will not be deemed to extend the time for taking proceedings to enforce the lien by action, until the defect is remedied, even though the work or materials were accepted only on the undertaking that the defect was to be remedied: *Neill* v. *Carroll*, 28 Gr. 30, affirmed on re-hearing, *Ib.* 339, Blake, V. C., dissenting; *Makins* v. *Robinson*, 6 O. R. 1; *Kelly* v. *McKenzie*, 1 Man. R. 169. But where the completion of the work has been delayed, its subsequent completion, even after a long delay, will extend the time for bringing an action to enforce the lien: *Irwin* v. *Beynon*, 4 Man. R. 10.

Death of lien-holder.

25. In the event of the death of a lien-holder, his right of lien (*a*) shall pass to his personal representatives: and the right of a lien-holder may be assigned by any instrument in writing (*b*). R. S. O. 1877, c. 120, s. 16.

(*a*) "*His right of lien.*" This would probably be held to include not only the lien on the land, but also, in the case of "sub-contractors," the charge upon the money in the hands of the "owner" which they may acquire under section 9, s.s. 2, and section 11.

Assignment of lien.

(*b*) "*May be assigned by any instrument in writing.*" Usually no particular form of words is necessary to create an assignment of the lien: it is sufficient if the intent is shown. Where a mechanic assigned his interest in a lien, and subsequently took a re-assignment of it in trust for his assignor, it was held, before this section was passed, that he was entitled to enforce the lien: *Currier* v. *Friedrick*, 22 Gr. 243.

Secs. 25, 26.

Rights of assignee.

The assignee can take no greater right under the assignment than the assignor himself had. Where a lien has expired in consequence of the lien-holder omitting to register it, a subsequent assignment of the debt, "with all rights and liens," passes no right of lien to the assignee: *Hooper* v. *Sells*, 58 Ga. 127; and an assignment would no doubt be held to be subject to any defence, or set-off, in respect of the whole, or any part, of the claim assigned, as existed at the time of the assignment, or before notice thereof to the debtor, or other person sought to be made liable, in the same manner, and to the same extent, as if there had been no assignment: see *R. S. O.* c. 122, s 11.

Assignment must be in writing.

Even, apart from this section, so far as the lien on the land is concerned, it would seem that there could be no valid assignment of it, except by writing; because the lien, being an interest in land, (*Stewart* v. *Gesner*, 29 Gr. 329), under the *Statute of Frauds* a parol assignment would be invalid: see *Ex parte Hall*, 10 Chy. D. 615.

But, it may be, that the same rule would not apply to assignments of the charge upon the moneys in the hands of the "owner" given by section 9, s.s. 2, and section 11, to sub-contractors, inasmuch as this is merely a personal claim, and not an interest in land.

Discharge of liens.

26. A lien may be discharged by a receipt (*a*) signed by the claimant, or his agent duly authorized in writing, acknowledging payment, and verified by affidavit and filed; such receipt shall be numbered and entered by the registrar, like other instruments, but need not be copied in any book; the fees shall be the same as for registering a claim or lien. 45 V. c. 15, s. 15; 47 V. c. 18, s. 4.

Secs. 26, 27.

Receipt in discharge of lien, form of.

(*a*) "*A receipt.*" No form of receipt is prescribed: but either the receipt or the affidavit verifying it ought to be so worded as to clearly identify the lien in respect of which it is given. A mere receipt for so much money, without any specific reference to the lien, or to the land affected by the lien, could not be properly registered, unless the affidavit supplied the deficiency. It is preferable that the receipt itself should show on its face to what particular lien it relates, so as to avoid, as far as possible, the possibility of controversy on the point.

Lien-holder wrongfully refusing to discharge lien.

Vacating lien or giving security.

This section refers to voluntary discharges of liens by lien-holders. Where the lien-holder wrongfully refuses to give a discharge of his lien, an application may be made, under section 30, s.s. 9, *post*, for the discharge of the lien; or the "owner" may apply, under section 9, s.s. 7, to vacate the lien on giving security for the amount claimed by the lien-holder.

For a Form of Receipt and Affidavit verifying same, see Appendix.

Cost of registering discharge.

27. Where there is a contract for the execution of the work, as hereinbefore mentioned, the registration of all discharges of liens shall be at the cost of the contractor (*a*), unless a Court or Judge otherwise orders (*b*). 45 V. c. 15, s. 16; 47 V. c. 18, s. 4.

Costs of discharges of liens, how borne.

(*a*) "*Contractor.*" *Prima facie*, all liens, whether registered by a "contractor" or any "sub-contractor" under him, are to be discharged at the cost of the "contractor." Of course the "contractor" here referred to is the "contractor" by whom the lien is registered; or where the liens are registered by "sub-contractors," then that particular "contractor" under whom such "sub-contractors" claim. One "contractor" is not liable to discharge the liens of "sub-contractors" under any other "contractor."

(*b*) "*Unless a Court or Judge otherwise orders.*" As between an "owner" and a "contractor" or "sub-contractor," the former should not be ordered to pay the cost of registering discharges of liens unless he has been in default; and as between a "contractor" and "sub-contractors," there seems to be no reason why the "contractor" should bear the cost of registering discharges of the liens of "sub-contractors" when he has not been in any default. Where no default can be proved by a "sub-contractor" against either the "owner" or the "contractor" under whom he claims, it would seem to be reasonable that the expense of registering a discharge of the lien of the "sub-contractor" should be borne by himself.

The words "unless a Court or Judge, etc.," imply that the Court or Judge may, in a proper case, make order that some one else than the "contractor" shall pay for registering the discharge of a lien: see *post*, *section* 30, s.s. 9.

Enforcement of lien in Division and County Court.

28.—(1) Where the amount of the claims in respect of any lien (*a*) is within the jurisdiction of the County or Division Courts respectively, proceedings to recover the same, according to the usual procedure of the said Court by judgment and execution (*b*), may be taken in the proper Division Court (*c*) or in the County Court of the county (*d*) in which the land charged is situate; or proceedings may be taken before the Judge of the said Courts, who may proceed in a summary manner by summons and order (*e*), and may take accounts (*f*) and make requisite enquiries, and in default of payment may direct the sale of the estate and interest

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charged (*g*), and such further proceedings may be taken as the Judge directs.

Conveyance by County Court Judge.

(2) Any conveyance under the seal (*h*) of the County Court Judge shall be effectual (*i*) to pass the estate or interest sold.

Fees.

(3) The fees and costs in all proceedings taken under this section shall be such as are payable in respect of the like or similar matters according to the ordinary procedure of the said Courts respectively. R. S. O. 1877, c. 120, s. 12.

In what Court proceedings to be taken.

(*a*) "*Where the amount of the claims in respect of any lien.*" This would appear to mean the aggregate amount of liens of the same class as that of the plaintiff, (see *section* 30, s.s. 1). Thus where a plaintiff's claim was under $200, but another lien of the same class was registered, which, with the plaintiff's, exceeded $200, it was held the action was properly brought in the High Court, and costs according to the higher scale were allowed, even though the other claimant failed to establish his claim : *Hall* v. *Pilz*, 11 P. R. 449. Where, however, a plaintiff claimed that there was due by the "owner" a sum exceeding the jurisdiction of the County Court, but only recovered a sum within the jurisdiction of the Division Court, he was held only entitled to costs according to the lower scale : *Smith* v. *McDonald*, 25 Gr. 600.

But inasmuch as the aggregate amount of the claims of a contractor and his sub-contractors against the "owner" cannot, generally speaking, exceed the amount due by the "owner" to the "contractor," (see *sections* 8, 10), in determining the Court in which a suit to enforce a lien should be commenced, the question would appear to be governed not

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altogether by the amount of claims of the plaintiff and other lien-holders of the same class, but by the amount claimed to be due from the "owner" applicable to the payment of the plaintiff and the class of lien-holders on whose behalf he sues, or is to be taken to sue, (see *section* 30) : *Knowles* v. *Smith*, per Proudfoot, V. C., 24th November, 1880 ; *Hall* v. *Pilz*, 11 P. R. 449. Where this sum does not exceed $100, the Division Court would appear to have jurisdiction, and if the amount is ascertained by the signature of the "owner," the jurisdiction of the Division Court extends to claims of $200, (*R. S. O.* c. 51, s. 70). But where the amount, not being ascertained by the signature of the "owner," exceeds $100, or, being ascertained by the signature of the "owner," exceeds $200, and does not exceed $400 ; or is liquidated or ascertained by the act of the parties, and exceeds $100, but does not exceed $400, then the County Court has jurisdiction : see "*The County Courts Act*," *R. S. O.* c. 47, s. 19. Where, however, an injunction is required to restrain the removal of any erection or machinery from the property over which the lien is claimed, in addition to the ordinary remedy for enforcing the lien, the jurisdiction of the County Court to grant such relief is confined to cases where the claim does not exceed $200, (see *section* 15).

In what cases claim enforceable by execution.

(*b*) "*By judgment and execution.*" The proceeding by judgment and execution appears to be available only where there is a privity of contract between the plaintiff and the "owner" ; or where, though there be no privity of contract, a personal liability has, under the Act, been incurred by the "owner" to the plaintiff. Where, however, there is no privity of contract between the plaintiff and the "owner," and no personal liability has been incurred by the "owner" to the plaintiff, the latter cannot enforce his lien against the "owner" by execution, but his only remedy as against him is to obtain a sale of the land, or the interest therein, which is bound by the lien. For this purpose, where the claim is

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to be enforced in a Division Court or County Court, the Judge is empowered to proceed in a summary manner by summons and order, (see *infra*, note *e*).

(*c*) "*The proper Division Court.*" See *R. S. O.* c. 51, ss. 81, *et seq.*

Land partly in one county and partly in another.

(*d*) "*County Court of the County in which the land is situate.*" Where the land sought to be charged is situate partly in one county and partly in another, the County Court of neither county would appear to have jurisdiction, and in such a case the action would have to be brought in the High Court, (see *McCrea* v. *Easton*, 19 C. L. J. 331).

Summary proceedings to enforce lien.

(*e*) "*By summons and order.*" It is presumed that what is intended by this section is that instead of resorting to the ordinary procedure of the Court by summons, under *The Division Courts Act*, *R. S. O.* c. 51, s. 94, or by a writ of summons under the usual procedure of the County Courts, an application may be made to the Judge, in the first instance, for a summons calling on the parties interested to show cause why the applicants' lien should not be paid, or why in default the land, or interest therein, subject to the lien, should not be sold for the satisfaction of the lien.

Whether summary proceedings keep alive other liens?

Assuming this to be the procedure intended, it may be doubted whether the provisions of section 30, s.s. 1, apply to such a proceeding. That sub-section provides that "any *action*" brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class, but the term "action" seems to be confined to proceedings commenced by writ; and this view is borne out by the concluding words of that sub-section. Although other lien-holders, therefore, who are not actually made parties to the proceedings, may not be entitled to the benefit of such proceedings, for the purpose of keeping their liens alive, yet it would seem that they should, nevertheless, be made parties thereto, in

order to bind them by the proceedings; and if they actually are made parties, it may be presumed that it would not be necessary for them to commence separate and independent proceedings on their own behalf in order to maintain their liens in force: see *Henry* v. *Bowes*, 3 C. L. T. 606. Section 28.

The application to the Judge should be supported by an affidavit of the plaintiff establishing the applicants' *prima facie* right to a lien on the land, or interest in the land, he seeks to have sold, and certificates of the Registrar and Sheriff of the Division or County in which the lands are situate should be produced, showing who the other parties are, whose interests are bound by the plaintiff's lien, and also all those who have liens or incumbrances on the land, who would be entitled to participate in the proceeds of the land in case it should be sold. Evidence on summary application.

The summons to be issued by the County Judge should be addressed to, and served upon, all these parties, in order that they may be brought before the Court to be bound by the orders which may be made in the matter.

For Form of Summons, see Appendix.

A certificate of *lis pendens* may be granted by the Judge for registration: see *section* 22. *Lis pendens.*

(*f*) "*And may take accounts.*" Upon the return of the summons, proof of its due service on all parties will have to be given. The Judge will then have first to determine any question that may be raised as to the liability of the estate, or interest of any of the parties summoned, to satisfy the lien of the plaintiff. If any of the parties summoned establish that their claims to the land are paramount to the plaintiffs' lien, then as to them the summons should be dismissed. Questions of this kind having been settled, the next thing to be done will be to ascertain whether or not anything is due from the "owner." If nothing is due, then the "owner's" interest Accounts to be taken on summary applications.

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in the land is not liable to any lien, (see *sections* 8, 10), and the summons should be dismissed altogether. Having ascertained what is due from the "owner," an account should be taken of the claims of the plaintiff and the other lien-holders and incumbrancers who have been summoned, and what proportion of the moneys due by the "owner" they are respectively entitled to; and a day should be appointed for the "owner" to pay the amount found due from him to the lien-holders and incumbrancers, according to their respective interests therein. The most convenient course would probably be to order him to pay the whole amount into court. The day to be named for payment should not be less than one calendar month from the making of the order: see *post*, *section* 30, s.s. 3.

Where the claims are not numerous, it will probably be found that the Judge himself will make the necessary inquiries, and take the necessary accounts; but where the matter is complicated, or the claims numerous, the Judge may refer the matter to the Clerk of the Court, or, under *R. S. O* c. 47, s. 34, to the Master of the Supreme Court having jurisdiction in the County where the proceedings are being carried on, to make the inquiries and take the accounts; but a reference to a Master does not seem to be warranted in Division Court cases.

Form of order on summary application.

The form of the order to be made will of course depend on which of these two courses is adopted. In the former case the order would contain what is usually contained in a judgment and a Master's Report in actions to enforce liens in the High Court. In the latter case it will be more in the form of a judgment only.

Parties entitled to notice of taking accounts.

In taking the account of the amount due from the "owner," all the lien-holders are entitled to notice; and in taking the accounts of what is due to the lien-holders, both the "owner" and the person primarily liable to the lien-holder should also

have notice, as the latter is liable to execution for any balance which may remain due to the lien-holder after the sale of the land : see *section* 30, s.s. 6 ; and other lien-holders are also interested in keeping down the claims of their fellow lien-holders, and should have notice of the taking of the accounts of the amounts due to them. See *post*, *section* 30, note *f*, as to the principle on which the different classes of lien-holders should be ascertained, and the amount due by the "owner" distributed. This may be subject to modification when some of the lien-holders have charges upon the price payable by the "owner" under sections 9, 11, and others have not. Section 28.

(*g*) "*May direct the sale of the estate and interest charged.*" A sale cannot be ordered to take place before the expiration of one month from the making of the order, (see *section* 30, s.s. 3), and only the interest of the "owner," whatever it may be, can be sold. Where other persons have interests in the land, whose rights are paramount to those of the lien-holders, the sale must be subject to their rights ; unless they come in and consent to a sale, which is sometimes done on the terms of their claims being a first charge on the purchase money. Sale. Property saleable.

(*h*) "*Any conveyance under the seal.*" The County Judge, being *ex-officio* Judge of the Division Court, all conveyances made in pursuance of the order of either the Division, or County Courts, are to be made by him. The statute only speaks of the seal of the Judge, but the signature of the Judge should also be appended to the instrument. The conveyance should recite the proceedings authorizing the sale, and it would seem that it is intended that the County Court Judge shall be the granting party in the conveyance, and should convey in a similar manner to a sheriff selling under execution. Only the interest authorized to be sold can be conveyed. Conveyance form, and execution of.

(*i*) "*Shall be effectual.*" If the Court by which a sale is ordered has no jurisdiction to direct the sale, it is very doubt- Effect of.

Secs. 28, 29, 30.

ful whether this section would give validity to the conveyance. The consent of the parties cannot give jurisdiction, and *a fortiori*—the passive acquiescence of the parties in the Court exercising a jurisdiction it does not possess—would be equally ineffectual.

Enforcing lien in High Court.

29. In cases other than those specified in the preceding section the lien may be realized in the High Court, according to the ordinary procedure of that Court (*a*). R. S. O. 1877, c. 120, s. 13.

(*a*) For forms of proceedings in actions brought in the High Court of Justice to enforce mechanics' liens, see Appendix.

Action by lien-holder to be for joint benefit.

30.—(1) Any number of lien-holders may join in one action, and any action brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class (*a*) who shall have registered their liens before or within 30 days after the commencement of the action, or who shall within the said 30 days file in the proper office of the Court from which the writ issued a statement, entitled in or referring to the said action, of their respective claims.

Prosecution of claim when plaintiff dies, etc.

(2) In the event of the death of the plaintiff, or his refusal or neglect to proceed, any other lien-holder (*b*) of the same class who has registered his lien or filed his claim in the manner and within the time above limited for that purpose may be allowed

to prosecute the action on such terms as may be deemed just and reasonable. 47 V. c. 18, s. 6. Section 30.

(3) In case of a sale of the estate and interest charged with the lien, the Court or Judge may direct the sale to take place at any time after one month (*c*) from the recovery of judgment, and it shall not be necessary to delay the sale for a longer period than is requisite to give a reasonable notice thereof. 45 V. c. 15, s. 12. Time when sale may be made.

(4) The said Court or Judge may also direct the sale of any machinery (*d*) and authorize its removal. R. S. O. 1877, c. 120, s. 14. The Court may order sale.

(5) Where judgment is given in favour of a lien, the Court or Judge may add to the judgment (*e*) the costs of and incidental to registering the lien, as well as the costs of the action. 45 V. c. 15, s. 14. Costs.

(6) Where there are several liens under this Act against the same property, each class of the lien-holders (*f*) shall, subject to the provisions of sections 5, 9 and 11, rank *pari passu* for their several amounts, and the proceeds (*g*) at any sale shall, subject as aforesaid, be distributed amongst them *pro rata*, according to their several classes and rights (*h*), and they shall respectively be entitled to execution (*i*) for any balance due to them respec- Several liens.

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tively after said distribution. R. S. O. 1877, c. 120, s. 17.

Security may be given in lieu of lien.

(7) Upon applications to the County Court, in claims under $200 (*j*), and to the High Court in other cases, the Court or Judge may receive security or payment into Court in lieu of the amount of the claim, and may thereupon vacate the registry of the lien.

Registry may be annulled.

(8) The Court or Judge may annul the said registry upon any other ground (*k*). R. S. O. 1877, c. 120, s. 23.

Wrongful claim or refusal to discharge, costs.

(9) In any of the said cases mentioned in sub-sections 7 and 8, the Court or Judge may proceed to hear and determine the matter of the said lien (*l*), and make such order as seems just, and in case the person claiming to be entitled to such lien has wrongfully refused to sign (*m*) a discharge thereof, or without just cause claims a larger sum than is found by such Court or Judge to be due, the Court or Judge may order and adjudge him to pay costs to the other party. R. S. O. 1877, c. 120, s. 24; 47 V. c. 18, s. 7.

Lien-holders of the same class, who are.

(*a*) "*Of the same class.*" Lien-holders of the same class would appear to be those who have contracted with the same person, *e.g.* all "contractors" are of the same class, (see *Bunting* v. *Bell*, 23 Gr. 584). So also all sub-contractors

who have contracted with the same "contractor" or "sub-contractor" are of the same class, but the "sub-contractor" of A cannot be said to be of the same class as the sub-contractor of B, nor are a "contractor" and any "sub-contractor" of the same class, (see, however, *McPherson* v. *Gedge*, 4 O. R. 260, per Galt, J.). Where a lien-holder instituted a suit on the 7th July, within the prescribed time, but omitted to serve the bill, and subsequently on the 19th January following the bill was dismissed for want of service, but before its dismissal, on the 15th July, another lien-holder of the same class commenced a suit; it was held that the claim of the plaintiff, in the suit commenced on the 7th July, was kept in force by the suit subsequently commenced on the 15th July: *Bunting* v. *Bell*, 23 Gr. 584; but see *Grainger* v. *Grainger*, 1 Chy. Ch. R. 241. Section 30.

(*b*) "*Any other lien-holder.*" Other lien-holders of the same class, not parties to the action, who are entitled under sub-sec. 1 to the benefit of the action, are bound to see that it is prosecuted to judgment, or it may be dismissed for want of prosecution, or compromised, (see *Smith* v. *Doyle*, 4 App. R. 477); but, where the plaintiff has consented to a dismissal of the action, it may nevertheless be restored on the application of any other lien-holder of the same class, entitled under sub-section 1, except as to the claim of the original plaintiff, even though the dismissal may have taken place before judgment obtained: *McPherson* v. *Gedge*, 4 O. R. 246. A lien-holder thus intervening must indemnify the original plaintiff against all costs, past and future, and if he carry on the suit in the name of the original plaintiff, he must also give the defendant security for his costs. *Ib.* Right of other lien-holders to intervene in action.

After judgment, no action on behalf of a class can properly be dismissed, even by consent of the plaintiff; the proper order in such a case is merely to stay the proceedings, but without prejudice to the rights or any other of the class Action not to be dismissed after judgment.

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entitled to the benefit of the action, to intervene and assume the conduct of the action, (see *Arnbery* v. *Thornton*, 6 P. R. 190), and it would seem that such is the proper order to make on any application to dismiss an action brought to enforce a mechanic's lien by consent of plaintiff, whether the application be made before or after judgment. It is doubtful whether any lien-holder could intervene and apply to carry on the action whose claim was not actually payable at the time the action was commenced: see *Burritt* v. *Renihan*, 25 Gr. 183.

Other lien-holders of same class added in M. O.

The other lien-holders of the same class as the plaintiff are not usually made parties by the writ of summons; they are added as parties in the Master's Office. The judgment hitherto has usually directed the Master to inquire as to incumbrances, etc., and, according to the practice prevailing in mortgage actions, he adds, as parties in his office, not only all other lien-holders entitled to the benefit of the action, but also all others appearing to have liens, or incumbrances, on the land, subsequent to the plaintiff.

Whether other subsequent incumbrancers should not be made original defendants?

It may be doubted, however, whether subsequent incumbrancers, other than lien-holders of the same class as the plaintiff, should not be made parties by writ, and whether such incumbrancers, if not made parties within the time limited by sections 22, 23, for commencing an action to enforce the lien, would not be entitled to say that so far as their incumbrances are concerned they are released from the lien: see *Bank of Montreal* v. *Haffner*, 10 App. R. 592; *S. C., sub nom. Bank of Montreal* v. *Worswick*, Cass Dig. 289. The principle of this case seems to have a wider application than has been generally supposed. Carried to its logical conclusion, it would appear to determine that the action to enforce a lien must be commenced not only against the "owner," but against all other persons having any interest in the land,

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whose rights are subject to the lien, within the time prescribed by sections 22, 23, and that it is too late to add such parties as defendants in the Master's Office when that period has expired. The practice in mortgage suits was originally to make all parties interested original parties to the suit, and in actions to enforce liens it would seem that this practice ought still to be pursued with the exception as to lien-holders of the same class as the plaintiff.

Other lien-holders, etc., how ascertained.

In order to ascertain who are the other lien-holders of the same class as the plaintiff, who should be added as parties in the Master's Office, a search must be made in the action for all claims of lien-holders filed therein within thirty days after the writ issued, and also in the Registry Office, for all liens registered up to the expiry of the said period of thirty days: it is not, however, necessary to search whether any other actions have been commenced, as such other actions could only have the effect of keeping alive liens in those particular actions: see *Grainger* v. *Grainger*, 1 Chy. Ch. R. 241; but see *Bunting* v. *Bell*, 23 Gr. 584.

Where made original defendants.

Although other lien-holders of the same class are usually made parties in the Master's Office, yet when any direct relief is claimed by the plaintiff against any such lien-holder, he should be made a defendant by writ.

Costs of action by other lien-holder.

Where another lien-holder of the same class as the plaintiff subsequently commences another action to enforce his lien, he cannot recover the costs of such action in that first commenced: *Henry* v. *Bowes*, 3 C. L. T. 606.

Time for sale.

(*c*) "*One month.*" Formerly the sale could only be effected at or after such time as the lands could have been sold under execution. This varied in the case of lease-holds, and free-

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holds, (see *The Execution Act*, *R. S. O.* 1877, c. 14, ss. 2-19; and see now C. R. 864, 899, 901); but now, in all cases, the sale may be ordered to take place at any time after the expiration of a month from the recovery of the judgment. According to the practice of the High Court, a month is allowed after the accounts have been taken for the payment of the amounts found due, and in default of payment, the sale is ordered.

Sale of machinery.

(*d*) "*Any machinery.*" This section authorizes the sale of machinery apart from the land on which it has been placed, and, notwithstanding it may have been affixed to the freehold. Notwithstanding the generality of the words "any machinery," machinery which is not subject to the claim of the lien-holder, could not be ordered to be sold, or removed under this section (see *ante*, p. 19, note *f*). Neither is it probable that the jurisdiction hereby conferred would be exercised, except in cases where it would be for the general benefit of all parties interested that the machinery should be sold apart from the land.

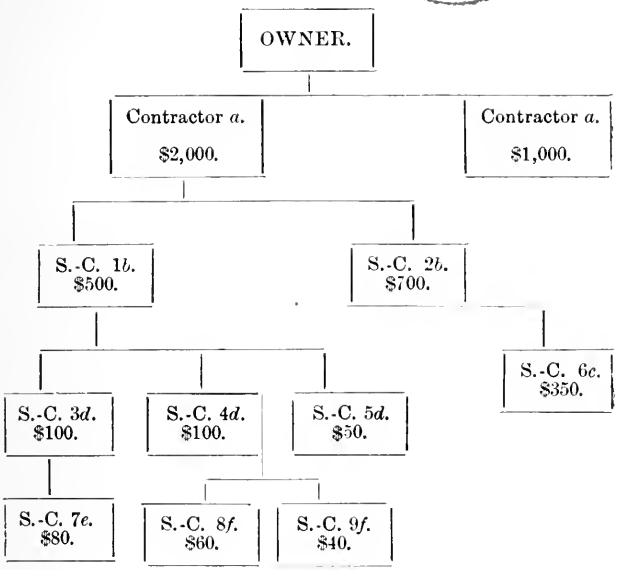
Costs of registering liens to be added to claim.

(*e*) "*May add to the judgment.*" This provision would appear to apply not only to the costs of registering the lien of the plaintiff, but also to the cost of registering other liens of the same class entitled to the benefit of the action. The judgment being a judgment not only for the enforcement of the plaintiff's lien, but those of the others of the same class, it should provide for the payment of the costs of registering the plaintiff's lien, and also those of the other lien-holders of the same class.

Lien-holders of the same class, who are.

(*f*) "*Each class of the lien-holders.*" These words are apparently intended to mean each series of lien-holders, who have contracted with the same person, whether he be

"owner," "contractor," or "sub-contractor." The following table will serve as an illustration. The letters S.-C. are used to designate sub-contractors, and the italics indicate those who are of the same class, and the various sums the amount of their respective contracts: Section 30.



Each sub-contractor can have no greater claim on the interest of the "owner" in the land than the person by whom he was employed; and when a "contractor" or "sub-contractor" has employed a "sub-contractor," the claim of such "sub-contractor" must be deducted from that of the person by whom he was employed. For example, the claims of S.-C. 1*b* and 2*b* in the above table must be deducted from the claim of the "contractor," under whom they claim; which

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would leave him only entitled to $800. So also the claims of S.-C. 3*d*, 4*d*, and 5*d* must be deducted from the claim of S.-C. 1*b*, by whom they were employed, which would leave the latter only entitled to $250, and so on with regard to the other "sub-contractors."

Plaintiff's costs, a first charge on proceeds.

(*g*) "*And the proceeds.*" That is, the net proceeds, after payment of the costs of action, if any, and of the sale, otherwise the burthen of realizing the claims of all parties would be cast upon the plaintiff or other party carrying on the proceedings: see *The Sherbro*, 48 L. T. N. S. 767.

Distribution of proceeds amongst lien-holders.

(*h*) "*Pro rata according to their several classes and rights.*" This does not mean that in every case in which the sum realized from the land is insufficient to pay all the liens thereon in full—all liens are to abate in equal proportions, some liens may be paid in full, notwithstanding a deficient fund; *e.g.*, if the dividend payable to S.-C. 3*d*, as shown above, were, but for his sub-contract with S.-C. 7*e*—say $90—the latter would appear to be entitled to be paid in full, and S.-C. 3*d* would get but $10, because he is indebted to S.-C. 7*e* in $80, and the latter stands in his place to that amount. But lien-holders of the same class (apart from any question arising under sections 5, 9, 11) are entitled to a *pro rata* distribution; *e.g.*, if the dividend coming to S.-C. 4*d* were less than $100, his sub-contractors 8*f* and 9*f* would be entitled to a *pro rata* share of it, 8*f* being entitled to $\frac{3}{5}$ and 9*f* to $\frac{2}{5}$ of the dividend.

Execution, against whom it may issue.

(*i*) "*Shall respectively be entitled to execution.*" The right to execution is only against those personally liable: generally speaking, execution lies against an "owner" only in favour of a "contractor."

Right to, suspended till lien realized.

The right to obtain execution is here given only after the distribution of the proceeds of the sale of the property subject to the lien; and it has been held by Rose, J., *Weatherdon* v. *Robinson*, Q. B. D., 23rd March, 1888, that in an action to enforce the lien, the plaintiff is not, though

he claim it by his pleading, entitled to judgment personally against his debtor in the first instance, but that he can only have a personal order for payment of the deficiency remaining after the property subject to the lien has been realized. The bringing of an action to enforce a lien, therefore, operates as a suspension of the right to execution against the primary debtor until the remedy to enforce the lien has been exhausted. But this, of course, in no way impairs the right of the lien-holder to abandon his claim to a lien and sue for and recover his claim by judgment and execution in the ordinary way. Section 30.

(*j*) "*In claims under two hundred dollars.*" In this sub-section the word "claims" must refer to the claim of the individual lien-holder, which is sought to be vacated or discharged. When the claim is over $200, the Master in Chambers has jurisdiction to entertain applications for the discharge of the lien under this section: *Re Moorehouse & Leak*, 13 O. R. 290. Vacating lien, jurisdiction of Master in Chambers.

(*k*) "*Upon any other ground.*" Full authority is given by this section, for the vacating or annulling of liens which have been improperly registered, or which have been satisfied, or which for any other reason ought to be vacated.

For form of order vacating a lien, see Appendix.

(*l*) "*Hear and determine the matter of the said lien.*" It is only the matter of the particular lien in dispute that is here referred to. Under this section, therefore, it would not appear to be intended, that the Court, or a Judge, on motion to vacate a lien, should make an order for its realization by a sale of the property, even though the claim should appear to be a valid and subsisting claim, as that might involve the right of other lien-holders (if any) who would not be parties to the proceedings. All that can be determined and adjudicated upon is the validity of the particular lien in dispute. The question, whether an issue should be ordered or not, is Motion to vacate lien.

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entirely within the discretion of the Judge to whom the application is made : *Re Moorehouse & Leak*, 13 O. R. 290.

Wrongful refusal to discharge lien —costs.

(*m*) "*Wrongfully refused to sign.*" When the refusal to sign a discharge is wrongful, or more is claimed by the lien-holder than is properly due to him, he may be ordered to pay the costs of the application to discharge the lien. Under section 27, the cost of registering discharges of liens is *prima facie* to be borne by the "contractor" ; but it would seem that the Court or Judge may otherwise order—and where the lien-holder is found to be in the wrong, and is ordered to pay the costs of the application to discharge his lien, it would seem that he might also be ordered to pay the costs of registering the discharge. A lien-holder would be deemed to have wrongfully refused to sign, even though he did so under a *bona fide* belief that his lien was not satisfied, or could be enforced, if such were not in fact the case, and, being a sub-contractor, a reasonable opportunity were afforded him of ascertaining the true state of the accounts between the "owner" and the "contractor," under whom he claimed.

When materials used in the construction of buildings are not to be subject to execution.

31. Where any mechanic, artisan, machinist, builder, miner, contractor or other person, has furnished or procured materials (*a*) for use in the construction, alteration or repair (*b*) of any building, erection or mine, at the request of and for some other person (*c*), such materials shall not be subject to execution (*d*) or other process, to enforce any debt (other than for the purchase thereof), due by the person furnishing or procuring such materials (*e*), and whether the same have or have not been in whole or in part worked into or made part of such building or erection. R. S. O. 1877, c. 120, s. 25.

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(*a*) "*Materials.*" This word would seem to include not only materials actually incorporated or intended to be incorporated into the structure, but such materials as may be required in the construction, alteration or repair of any building, etc., though not incorporated, nor intended to be incorporated, therein : as, for example, a hoisting apparatus: *Dixon* v. *LaFarge*, 1 E. D. Smith, 722 ; or scaffolding, or machinery used in connection therewith. So where it is necessary to blast and remove rock from land preparatory to building, the powder and fuses necessary for that purpose would appear to be "materials" within the meaning of this section: *Hazard Powder Co.* v. *Byrnes*, 12 Abb. Pr. 469, S. C. 21, How. Pr. (N.Y.) 189.

Materials exempted.

(*b*) "*In the construction, alteration or repair.*" These words, though appropriate enough as regards any "building or erection," do not seem particularly well chosen when used in reference to a mine, and though where an Act gave a lien for "materials to be used in or about a mine," powder, steel, and candles, indispensably necessary for working a mine, were held to be clearly within the statute : *Keystone* v. *Gallagher*, 5 Col. 23 ; still, it may be doubted whether materials furnished for working a mine could properly be said to be furnished for use either in its "construction, alteration, or repair," hence it is open to doubt whether materials furnished for working a mine are within this section.

Materials used for mining, whether exempt?

(*c*) "*At the request of and for some other person.*" These words limit the application of this section to materials furnished or procured by "contractors" or "sub-contractors." Materials furnished or procured by an "owner" for the erection, alteration or repair of a building on his own property, are not within the section.

Materials procured by "owner" not exempt.

(*d*) "*Shall not be subject to execution.*" This section is not intended to exonerate the materials from all executions, but only from executions to enforce any debts *due by the person*

Exemption from execution, how far it extends.

Section 31.

by whom the materials are furnished or procured, excepting such as were incurred by the latter for the purchase of the materials. The proper construction of the Act appears to require that the words "any debt" should be qualified by the words "due by the person furnishing or procuring such materials," for if the latter words were to be held to qualify only the words "other than for the purchase thereof," it would seem to follow that the materials of all buildings erected by one person for another, are absolutely and indefinitely exempted from all liability to execution, whether against the "owner" or any other person, a result which it seems needless to say could never have been intended. Although the Act does not protect the materials from execution to enforce a debt incurred for the purchase thereof, it does not follow that the materials will be in all cases saleable even under such an execution; that will depend on whether the materials had, or had not, ceased to be the property of the debtor. After materials have become incorporated in a building, they would cease to be liable to execution against the "contractor" or "sub-contractor" furnishing them, and there is nothing in this section to exonerate them from liability to enforce debts due by the "owner." But such executions might be subject to the right of lien, if any, acquired by the "contractor" or "sub-contractor" under this Act.

Execution, against "owner," will bind materials incorporated in land.

(*e*) "*Due by the person furnishing or procuring such materials.*" These words are to be read in connection with the previous part of this section, from which it will be seen that they refer only to persons furnishing or procuring materials for the specific purpose mentioned "*at the request of, and for, some other person.*" It is only against certain debts of such persons that the materials are protected. In other words, this section exempts materials from liability for certain debts due by the person *by whom* they are furnished or procured, but does not exempt them from liability to execution for any

debts due by the person *to, or for, whom* they have been furnished or procured. For example, materials furnished by a "contractor" for an "owner" would be free from liability for the debts of the "contractor," except such as may have been incurred for the purchase of such materials ; but they would not be exempt from liability to execution for any debts of the "owner" so soon as the materials should, by incorporation into his building, or otherwise, have become his property.

Mechanics entitled to lien on a chattel may sell the chattel if (after three months) payment is not made.

32.—(1) Every mechanic or other person who has bestowed money or skill and materials upon any chattel or thing in the alteration and improvement in its properties or for the purpose of imparting an additional value to it so as thereby to be entitled to a lien (*a*) upon such chattel or thing for the amount or value of the money or skill and materials bestowed, shall, while such lien exists (*b*) but not afterwards, in case the amount to which he is entitled remains unpaid for three months (*c*) after the same ought to have been paid (*d*) have the right in addition to all other remedies provided by law, to sell the chattel (*e*) or thing in respect of which the lien exists, on giving one week's notice (*f*) by advertisement in a newspaper published in the municipality in which the work was done, or in case there is no newspaper published in such municipality, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of the debt, a description of the chattel

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or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last or known place of residence (if any) of the owner, if he be a resident of such municipality.

Application of proceeds of sale.

(2) Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him (*g*) and the costs of advertising and sale, and shall upon application pay over any surplus (*h*) to the person entitled thereto. 41 V. c. 17, s. 3.

Nature of liens on chattels at common law.

General lien.

(*a*) "*So as thereby to be entitled to a lien.*" At common law there are two kinds of liens on chattels, viz.: general liens, and particular liens. A general lien is a right to retain a chattel not merely for work or money expended on the specific chattel retained, but also for the general balance of account due by the owner to the lien-holder. A particular lien is the right to retain a chattel for the work or money expended on it. At common law, the lien of a mechanic on chattels, independent of any contract express or implied, is

Particular lien.

particular and not general, (*Phillips*, ss. 470-1). The right of particular lien exists when there is no agreement to the contrary, in every case where a bailee for hire has, by his labour and skill, or by the use of any instrument over which he has control, imparted additional value to the goods of another: see *Cross on Lien*, 24; *Phillips*, s. 474; *Jackson* v. *Cummins*, 5 M. & W. 342.

A shipwright is entitled to a lien on a ship for repairs: *Franklin* v. *Hosier*, 4 B. & Ald. 341: and so is an engineer, for engines and boiler furnished by him to a vessel: *Ex p. Willoughby*, 44 L. T. N. S. 111, 16 Ch. D. 604.

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Act confined to particular liens.

The Act is confined to the case of particular liens, and only authorizes a sale for the satisfaction of claims for money, work, or materials bestowed in the alteration and improvement of the particular chattel sold. It does not authorize the sale of chattels to enforce a general lien existing thereon.

Duration of lien.

Parting with possession puts an end to lien.

(*b*) "*While such lien exists.*" The lien exists only so long as the lien-holder retains possession of the chattel, and his claim for work and materials bestowed thereon is unpaid. The parting with possession is a surrender of the right of lien, even though the claim remain unpaid ; and so also is the release of the debt, even though the possession of the chattel be retained. The possession must be continuous. Thus, where a mechanic had repaired a carriage and allowed it to remain in his yard, but the owner had frequently taken it out of the yard, and returned it ; it was held that the mechanic could not afterwards retain it for the amount of the repairs : *Hartley* v. *Hitchcock*, 1 Starkie, 408. But, where A. sent a waggon to B. to make certain wood-work therefor, and B., having finished the wood-work, sent the waggon in A.'s name to another mechanic to do the iron-work, and subsequently got back the waggon, and upon A.'s calling for the waggon, allowed him to remove the box to the highway ; but, on his returning for the running part, refused to let it go until he was paid his bill ; it was held, that B. had not absolutely lost his lien by sending the waggon to the blacksmith, and that it revived on his again obtaining possession, and that allowing A. to move the box to the highway was no waiver of his lien : *Milburn* v. *Milburn*, 4 U. C. Q. B. 179 ; and see *Webber* v. *Cogswell*, 2 S. C. R. 15 ; but, see *McNeil* v. *Keleher*, 15 C. P. 470.

And where an engineer had furnished an engine and boiler for a barge, and part of the contract price was not payable until after a trial trip ; and after the barge was ready to make the trip, but before it had been made, the owner failed, and a receiver having been appointed took possession

Section 32.

of the barge, which was at that time lying in the docks in the name of the engineer, it was, nevertheless, held, that the right of lien was not lost: *Ex p. Willoughby*, 44 L. T. N. S. 111; 16 Ch. D. 604.

Lien cannot be claimed so as to intercept performance of contract.

A lien cannot be claimed so as to intercept the performance of the actual contract between the parties, whether the contract is expressed, or is to be inferred from a certain course of dealing: *per* Lord Selborne, C., *Fisher* v. *Smith*, 39 L. T. N. S. 430; 4 H. L. 1.

Lien, how affected by credit being given.

When the work is done on credit, and the period of credit has not expired before the goods are to be delivered, no lien exists: *Cross*, 43. But it is said if the bailee retain possession, and the owner become bankrupt before the period of credit has expired, the lien would attach as against the assignee, (*Phillips*, s. 499). But such lien, if any, could not prevail against a person to whom the chattel may in the meantime have been sold by the owner: *Crawshay* v. *Homfray*, 4 B. & Ald. 50. The taking of a security payable at a future day, in the absence of an agreement to the contrary, puts an end to the lien: *Dempsey* v. *Carson*, 11 C. P. 462.

Taking security, effect of on lien.

The mere taking of security for the debt does not put an end to the lien, unless there be something in the facts of the case, or in the nature of the security taken, which would be inconsistent with the retention of the lien: *Angus* v. *McLachlan*, 48 L. T. N. S. 863; 23 Ch. D. 330.

Possession must be lawful.

The possession must be lawful, or there will be no lien. Where one wrongfully obtains possession of chattels, and delivers them to a third party, who bestows money, skill or materials thereon, the latter would have no lien therefor, as against the rightful owner: *Hartop* v. *Hoare*, 3 Atk. 43.

Lien only arises under a contract.

The lien can only arise by virtue of a contract, express or implied, with the owner or his agent: *Phillips*, ss. 494, 497.

A sub-contractor has no right of lien which could be enforced against the owner under this section : *Phillips*, s. 496. Section 32.

(c) "*Three months*," *i.e.* calendar months : see *The Interpretation Act*, *R. S. O.* c. 1, s. 8, s.s. 15.

(*d*) "*After the same ought to have been paid.*" Where credit is given, and the right of lien is preserved by express agreement, the three months will not commence to run until the expiration of the period of credit.

(*e*) "*To sell the chattel.*" Prior to this Act a person acquiring a lien on a chattel for work done, had only a right to retain it in his possession until his claim was paid by the owner ; the present Act enables him to realize the amount due to him by a sale of the chattel. Sale of chattel to realize lien.

It would seem that the lien-holder cannot himself be the purchaser at the sale : see *King* v. *England*, 4 B. & S. 782 ; *Williams* v. *Grey*, 23 C. P. 561 ; *Burnham* v. *Waddell*, 28 C. P. 263 ; 3 App. R. 288. Lien-holder cannot be purchaser.

(*f*) "*On giving one week's notice.*" A week should elapse from the date of the first publication of the notice, before the sale. The notice should strictly follow the Act, any material omission might invalidate the sale and subject the vendor to an action of damages : see *Shultz* v. *Reddick*, 43 U. C. R. 155. Notice of sale.

For Form of Notice of Sale, see Appendix.

(*g*) "*Amount due to him.*" A workman detaining a chattel in respect of a lien for work done thereon, has no claim for warehouse charges during such detention : *Bruce* v. *Everson*, 1 Cab & Ellis, 18. Lien-holder cannot claim warehouse charges.

(*h*) "*Shall, upon application, pay over any surplus.*" The Act does not cast upon the lien-holder the duty of finding Surplus, how to be disposed of.

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out the owner and tendering him the surplus, but merely requires him to pay it over on the application of the owner.

The lien-holder would not be justified in mixing the surplus with his own moneys, or using it for his own purposes. He should either pay it over to the party entitled, or, if there be any difficulty in doing that, he may, under the *Trustee Relief Act*, pay the money into the High Court of Justice, (see *Taylor & Ewart*, pp. 136-143), where it will bear interest at the rate allowed by the Court; or, he must otherwise set it apart so that it may be fruitful for the party entitled. If he neglect to do either of these things, he may be chargeable with interest on the surplus while it remains in his hands: see *Charles* v. *Jones*, 56 L. T. N. S. 848; 35 Ch. D. 544.

SCHEDULE.

FORM 1.

CLAIM OF LIEN.

Form of claim of lien for registration.

A. B. (*name of claimant*) of (*here state residence of claimant*) (*if so*, as assignee of, *stating name and residence of assignor*) under the Mechanics' Lien Act, claims a lien upon the estate of (*here state the name and residence of owner of the land upon which the lien is claimed*) (*a*) in the undermentioned land in respect of the following work [*or* materials], that is to say (*here give a short description of the nature of the work done, or materials furnished, and for which the lien is claimed*), which work was [*or* is to be] done [*or* materials were furnished] for (*here state the name and residence of the person upon whose credit the work is done or materials furnished*), on or before the day of .

The amount claimed as due [*or* to become due] is the sum of $.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged, sufficient for the purpose of registration*).

When credit has been given, insert: The said work was done [*or* materials were furnished] on credit, and the period of credit agreed to expired [*or* will expire] on the day of , 18 .

Dated at , this day of , A.D. 18 .

(*Signature of claimant*).

(*a*) For the purpose of avoiding the difficulty which arose in *Makins* v. *Robinson*, 6 O. R. 1, it might be well to insert here, "and all persons claiming under him subsequently to the (*date when lien attached*)": see *ante*, p. 8.

Schedule.

FORM 2.

CLAIM OF LIEN FOR WAGES.

Form of claim for wages for registration.

A. B. (*name of claimant*) of (*here state residence of claimant*) (*if so*, as assignee of, *stating name and residence of assignor*), under the Mechanics' Lien Act, claims a lien upon the estate of (*here state the name and residence of the owner of land upon which the lien is claimed*) (*a*) in the undermentioned land in respect of days' work performed thereon while in the employment of (*here state the name and residence of the person upon whose credit the work was done*) on or before the day of .

The amount claimed as due is the sum of $.

The following is the description of the land to be charged, (*here set out a concise description of the land to be charged, sufficient for the purpose of registration*).

Dated at , this day of .

(*Signature of claimant*).

FORM 3.

CLAIM OF LIEN FOR WAGES BY SEVERAL CLAIMANTS.

Form of claim for wages by several lien-holders, for registration.

The following persons, under the Mechanics' Lien Act, claim a lien upon the estate of (*here state the name and residence of the owner of land upon which the lien is claimed*) (*a*) in the undermentioned land, in respect of wages for labour performed thereon while in the employment of (*here state name*

(*a*) See note to Form 1.

and residence, or names and residences, of employers of the several persons claiming the lien). Schedule.

A. B. of (*residence*) $, for days' wages,
C. D. " $, for days' wages,
E. F. " $, for days' wages.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged, sufficient for the purpose of registration*).

Dated at , this day of .

(*Signatures of the several claimants*).

FORM 4.

AFFIDAVIT VERIFYING CLAIM.

I, *A. B.*, named in the above (*or* annexed) claim, do make oath that the said claim is true (*or* that the said claim, so far as relates to me, is true). Form of affidavit verifying claim for registration.

Or, We, *A. B.* and *C. D.*, named in the above (*or* annexed) claim, do make oath, and each for himself saith that the said claim, so far as relates to him, is true.

[*Where affidavit made by agent or assignee, a clause must be added to the following effect:*—I have full knowledge of the facts set forth in the above (*or* annexed) claim.]

Sworn before me at , in the County of , this day of , A.D. 18 .

Or, The said *A. B.* and *C. D.* were severally sworn before me at in the County of , this day of A.D. 18 .

Or, The said *E. D.* was sworn before me at in the County of , this day of , A.D. 18 .

45 V. c. 15, Sched. Form C.

APPENDIX.

ADDITIONAL FORMS OF PROCEEDINGS UNDER THE MECHANICS' LIEN ACT.

5.—NOTICE BY SUB-CONTRACTOR TO "OWNER," UNDER SECTION 11.

To (*name of owner*).

Form of notice by sub-contractor to "owner" under s. 11.

Take notice that I have been employed by (*name of contractor by whom the person giving the notice was employed*) to do work as [a painter on (*or* to supply materials for)] the building erected [*or*, now being erected] on (*give short description of premises, as, for instance*, lot 21, on the north side of Queen Street, in the City of Toronto, according to plan 81, registered in the registry office of, etc.,) and that the said (*name of contractor*) is indebted to me for such work [*or* materials] in the sum of $, which is unpaid, and I claim a charge therefor on all moneys due by you to the said (*name of contractor*).

Dated this day of , 18 .

(*Signature of sub-contractor giving the notice.*)

Appendix.

6.—FORM OF APPOINTMENT OF ARBITRATOR.

Form of appointment of arbitrator.

Whereas I, A. B., claim to be entitled to a lien upon the estate and interest of (*name of owner*) in (*describe the lands*) [*or* a charge upon the money due from (*name of owner*) to you (*name of contractor*)], for and in respect of a claim of $, which I claim to be due to me by you for work done [*or* materials furnished], which claim you dispute. I do, therefore, hereby and by virtue of the statute in that behalf, appoint C. D., of (*state his residence and occupation*), as arbitrator to determine all matters in dispute between us touching my said claim. And I do hereby require you, within three days after the service hereof, to appoint an arbitrator on your behalf, and in default of your so doing I shall apply to the Judge of the County Court of the County of (*the County in which the lands lie*) to appoint an arbitrator for you.

Dated this day of , 18 .

(*Signature of sub-contractor whose claim is disputed.*)

To (*name of debtor disputing the claim*).

7.—FORM OF RECEIPT IN DISCHARGE OF LIEN, UNDER SECTION 26.

Form of receipt in discharge of registered lien under s. 26.

I (*name of lien-holder*) acknowledge to have received from (*name of "owner" or other person making payment*) $ in full discharge of my mechanics' lien as a [contractor *or* sub-contractor, *as the case may be*] upon lot (*give short description of land sufficient for registration purposes, e.g.*, the west-

erly 40 feet of lot 36, on the north side of Street, according to plan No. , registered in the City of). Appendix.

Dated this , day of , 18 .

(*Signature of lien-holder.*)

WITNESS :

(*Signature of witness.*)

8.—AFFIDAVIT VERIFYING RECEIPT IN DISCHARGE OF LIEN, UNDER SECTION 26.

COUNTY OF ,

To wit :

In the matter of the Mechanics' Lien Act.

I, , of (*state residence and occupation*), make oath and say : Form of affidavit verifying receipt.

1. I was personally present, and did see (*name of lien-holder giving receipt*) duly sign the above [*or* annexed *or* within, *as the case may be*] written receipt.

2. That I well know the said (*name of lien-holder* , and the said receipt was signed by him at the (*state place where receipt signed*).

(*Signature of deponent.*)

Sworn before me, at , this day of .

(*Signature of commissioner.*) (*a*)

(*a*) The affidavit may be sworn before a commissioner for taking affidavits : see *R. S. O.* c. 62, s. 12.

Appendix.

9.—FORM OF INDORSEMENT ON WRIT OF SUMMONS. (*a*)

Form of indorsement on writ of summons.

The plaintiff's claim is $ [for the price of goods sold by the plaintiff to the defendant (*naming defendant liable on the contract*), *or*, for the price of goods sold and labour performed by the plaintiff to and for the defendant (*naming the defendant liable on the contract*)], and the plaintiff claims a lien for the sum of $, upon the estate and interest of the defendant (*name of owner*) in the following lands (*give description of lands sufficient for registration*), and to enforce such lien under the provisions of the Mechanics' Lien Act.

10.—FORM OF CERTIFICATE OF *LIS PENDENS*.

In (*name of Court*).

Form of certificate of *lis pendens*.

I certify that in an action or proceeding in (*name of Court*), between A. B., plaintiff, and C. D. and E. F., defendants, some title or interest is called in question in the following land (*describe it as in the indorsement of writ or statement of claim or other proceedings*).

Dated at, etc.

As witness my hand and the seal of [the said Court, *or* my office].

(*Signature of Judge or Clerk.*)

(*a*) Judgment to enforce a mechanics' lien can only be obtained in default of appearance, upon a motion to the Court under Rule 211 (C. R. 727). In order to move for judgment under this Rule, a statement of claim must be filed: *Hunter* v. *Wilcockson*, 9 P. R. 305. In actions to enforce a mechanics' lien, therefore, it seems advisable to serve a statement of claim with the writ. The indorsement on the writ need not go into all the details contained in a statement of claim. Where the action is brought to enforce an unregistered lien, it is necessary to issue and register a certificate of *lis pendens*. This certificate must be registered within thirty days from the completion of the work, or the supplying or placing of the machinery, in respect of which the lien is claimed, otherwise the lien will cease, (*section* 22).

11.—STATEMENT OF CLAIM IN AN ACTION TO ENFORCE MECHANICS' LIEN OF CONTRACTORS.

Appendix.

IN THE HIGH COURT OF JUSTICE,

——— Division.

Writ issued, , 18 .

Between J. E. and W. B., Plaintiffs,

and

M. A. T., Defendant.

Form of statement of claim in action by contractor.

The plaintiff, J. E., is a builder, carrying on business in the City of Toronto, in the County of York, and the plaintiff, W. B., is a bricklayer, also carrying on business in the said City of Toronto.

1. On the 11th day of November, 18 , the defendant was, and she has ever since remained, and now is, the [owner in fee simple of the lands and *or* lessee of certain leasehold] premises in the City of Toronto, in the County of York, more particularly described in the claim or lien hereinafter set forth. (*a*)

2. On or about the said 11th day of November, the plaintiffs, who are mechanics, were employed by the said defendant to perform certain work and to furnish certain materials for the erection of a brick hotel upon the said land for the said defendant, and there was no agreement (*b*) between the said defendant and the plaintiffs that the plaintiffs should not be entitled to a lien upon the said lands and buildings for the price of the said work and materials.

(*a*) If the lien has not been registered before action, this paragraph should set forth the lands upon which the lien is claimed, and should be modified accordingly.

(*b*) *Rathburn* v. *Burgess*, 17 C. L. J. 111.

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3. In pursuance of the said employment, the plaintiffs did do a large amount of work upon and did furnish large quantities of materials, which were used in and about the erection of the said brick hotel upon the said lands, to the value of $18,000, and completed the same on the 4th day of September, 18 , whereby the defendant became indebted to the plaintiffs for the said work and materials in the said sum of $18,000.

4. The sum of $15,000 has been paid on account of the said sum of $18,000, leaving a balance of $3,000 still due and payable to the plaintiffs.

5. By reason of being so employed, and doing the said work, and furnishing the said materials, as aforesaid, the plaintiffs became and are entitled to a lien on the estate and interest of the defendant in the said lands for the said sum of $3,000, under the provisions of "*The Mechanics' Lien Act.*"

(*If the lien has been registered before action, proceed as follows :*)

[6. On the 21st day of September, 18 , the plaintiffs, in pursuance of the said Act, caused to be registered in the Registry Office, in and for the City of Toronto, a claim of lien, which claim is in the words and figures following, that is to say : (*a*)

"J. E., of the City of Toronto, in the County of York, builder, and W. B., of the same place, bricklayer, under '*The Mechanics' Lien Act*,' claim a lien upon the estate of M. A. T., of the said City of Toronto, in the under-

(*a*) Where a lien is registered before action, it is necessary that the action should be commenced within ninety days from the day on which the work was completed, or materials or machinery furnished, or the period of credit mentioned in the registered claim expired, (see *sections* 23, 24.)

mentioned land, in respect of the following work and materials, that is to say :

To amount of contract		$17,000
Bill of extras.		
To extra stone in foundation.....		500
" Brick pointing		200
" Second flats of extra $\frac{1}{4}$-bricks in thickness		300
		$18,000
1873.		
Dec. 1.--By cash.....	$2,000	
" 22.— "	1,000	
1874.		
Jan. 5.— "	5,000	
July 6.— "	7,000	
		$15,000
Balance.....		$3,000

which work was done and materials were furnished for the said M. A. T. between the 1st day of May, A.D. 18 , and the 4th day of September, A.D. 18 , the amount claimed as due is the sum of $3,000 ; the following is the description of the land to be charged :—All and singular that certain parcel of land known as lot 3, on the west side of John Street, as shown on the plan of *J. S. Dennis, P.L.S.*, registered in the Registry Office of the said City of Toronto, and numbered D. 63.

" Dated at the City of Toronto, in the County of York, this 21st day of September, A.D. 18 .

"Witness,
"*Signed* J. BARNES, } *Signed* J. E.
Signed W. B.

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—which statement was verified by an affidavit of the plaintiffs, sworn before a commissioner for taking affidavits in the said County of York, as required by the said statute."] (*a*)

[*If the lien has not been registered before action, proceed as follows, omitting the above paragraph* 6 :

in respect of the following work and materials, that is to say, (*set out particulars of claim in manner shown above in paragraph* 6, *and proceed*).

6. The work mentioned in the above particulars was completed on (*stating the true date of the completion, which should be within thirty days from the issue of the writ : see section* 22), [*or*, the said machinery mentioned in the above particulars was supplied [*or* placed] upon the said lands in the first paragraph hereof mentioned on (*stating when the delivery of the machinery was completed, which should be a day within thirty days from the issuing of the writ*).

6*a*. A certificate of *lis pendens* has been issued in this action, and duly registered in the registry office for , on the day of (*naming a day within thirty days from the completion of the work, or the delivery or placing of the machinery in respect of which the lien is claimed*).]

7. The lands referred to in the first paragraph hereof, [and particularly described in the said claim of lien herein-

(*a*) A lien for work must be registered before or during its progress, or within thirty days after its completion, and a lien for materials or machinery must be registered within thirty days from the delivery or placing thereof, (see *section* 21) unless the action be commenced, and a certificate of *lis pendens* be registered within thirty days from the completion of the work or delivery of the materials or machinery, in which case registration of the claim before action is unnecessary : (see *section* 22). Where a statement of claim shows that the registered claim was not in proper form, or not registered within the time limited by the Act, the statement of claim is demurrable : *Roberts* v. *McDonald*, 15 O. R. 80.

before set forth,] (*a*) are the lands occupied by and usually enjoyed with the said hotel.

The plaintiffs claim :—

1. That the defendant may be ordered to pay to the plaintiffs forthwith the said sum of $3,000, together with the interest thereon and the costs of this action.
2. And that in default of such payment, all the estate and interest of the defendant in the said lands and buildings, or a competent part thereof, may be sold, and the proceeds thereof applied in or towards payment of the plaintiffs' debt and the costs of this action, pursuant to the said "*The Mechanics' Lien Act.*"
3. That for the purposes aforesaid all proper directions may be given and accounts taken.
4. Such further relief as the nature of the case may require.

The plaintiffs propose that this action should be tried at Toronto.

Delivered the day of , 18 , by X. Y. Z., of , plaintiffs' solicitor.

12.—STATEMENT OF CLAIM IN ACTION TO ENFORCE A MECHANICS' LIEN BY A SUB-CONTRACTOR.

IN THE HIGH COURT OF JUSTICE,

——— Division.

Writ issued 18 .

Between J. E., Plaintiff,

and

M. A. T. (*Owner*), C. D. (*Contractor*), and E. T. (*Sub-contractor by whom plaintiff employed*)—Defendants.

Form of statement of claim in action by sub-contractor.

1. On the 11th day of November, 18 , the defendant, M. A. T., was and she has ever since remained and now is

(*a*) The words in brackets should be omitted when the lien has not been registered before action.

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the [owner in fee simple of the lands and, *or* lessee of certain leasehold] premises in the City of Toronto, in the County of York, (*if the plaintiff's lien has been registered, conclude as in preceding form, if not, say*) known and described as follows, that is to say: (*set out description of land over which lien is claimed*).

2. On or about the said 11th day of November, the said defendant, M. A. T., employed the defendant, C. D., to perform certain work and to furnish certain materials for the erection of a house upon the said land for the said defendant, M. A. T., for the price or sum of $10,000.

3. The defendant, C. D., accepted the said employment, and agreed with the said M. A. T., to perform the said work and to furnish the said materials, and afterwards employed the defendant, E. T., to do part of the said work and furnish part of the materials required for the erection of the said house, for the sum of $1,000, which employment the defendant, E. T., accepted, and he agreed with the said C. D. to do the work and furnish the materials last referred to for the said price or sum of $1,000.

4. On the 11th day of December, 18 , the defendant, E. T., employed the plaintiff to do part of the work and furnish part of the materials for the erection of the said house which he had so agreed with the said defendant, C. D., to do and furnish as aforesaid, and agreed to pay the plaintiff therefor the price or sum of $500; and there was no agreement (*a*) between the plaintiff and the said M. A. T., that the plaintiff should not be entitled to a lien for the work done and materials furnished by him, as hereinafter mentioned.

5. The plaintiff accepted the said employment, and in pursuance thereof the plaintiff did do a large amount of work upon, and did furnish large quantities of material in and

(*a*) *Rathburn* v. *Burgess*, 17 C. L. J. 111.

about the erection of, the said house upon the said lands to the value of $500, and completed the said work and the delivery of the said materials on the 5th day of January, 18 , whereby the defendant, E. T., became indebted to the plaintiffs for the said work and materials in the said sum of $500.

6. The said work was done, and the said materials were furnished by the plaintiff in accordance with the terms of the contract or agreement between the said defendants, M. A. T. and C. D., and there is now due a large sum of money by the said M. A. T., under her contract with the said C. D., which the plaintiff claims equals or exceeds $.

7. The sum of $100 has been paid by the said E. T. on account of the said sum of $500, leaving a balance of $400 still due and payable by him to the plaintiff.

8. By reason of being so employed, and doing the said work and furnishing the said materials as aforesaid, the plaintiff became and is entitled to a lien on the estate and interest of the defendant, M. A. T., in the said lands for the said sum of $400, under the provisions of the said "*The Mechanics' Lien Act.*" (*Where notice has been given under section* 11, see Form 13, *post*).

If the lien has not been registered before action, proceed as follows :—

9. A certificate of *lis pendens* has been issued in this action and registered in the Registry Office for on the day of (*naming the day, which should be within thirty days from the date mentioned in paragraph* 5 *as the date of the completion of the work, etc.*).

9. [*If the lien has been registered before action proceed as in paragraph* 6 *of preceding form.*]

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10. The lands referred to in the first paragraph of this statement of claim [*if so*, and particularly described in the said claim or lien hereinbefore set forth] are the lands occupied by and usually enjoyed with the said house.

11. The defendants, C. D. and E. T., have also done work and furnished materials in and about the erection of the said house and are entitled to liens in respect thereof upon the said lands under the said "*The Mechanics' Lien Act.*"

The plaintiff claims :—

1. That the defendant, E. T., may be ordered to pay to the plaintiff forthwith the said sum of $400, together with interest and the costs of this action.

2. And that the defendant, M. A. T., may also be ordered to pay the same or such part thereof as the plaintiff, by virtue of his said lien and charge as aforesaid, is entitled to receive from the said M. A. T.

3. And that in default of such payment by the said M. A. T. and the said E. T. that all the estate and interest of the defendant, M. A. T., in the said lands and buildings, or a competent part thereof, may be sold, and the proceeds applied in or towards payment of the plaintiff's debt and the costs of this action, pursuant to the said "*The Mechanics' Lien Act.*"

4. That for the purposes aforesaid all proper directions may be given and accounts taken.

5. And that the plaintiff may have such further relief as the nature of the case may require.

The plaintiff proposes that this action should be tried in Toronto.

Delivered the day of , 18 , by X. Y., of , plaintiff's solicitor.

13.—CLAIM BY A SUB-CONTRACTOR TO CHARGE ON MONEYS IN THE HANDS OF THE "OWNER," UNDER SECTION 11. (a)

Form of claim of charge on moneys in owner's hands under s. 11.

On the day of the plaintiff delivered to the defendant (*owner*) notice in writing of his said lien, according to the provisions of section 11 of *The Mechanics' Lien Act*, whereby the plaintiff became and now is entitled to a charge upon all moneys which on the said day of (*date of giving notice*) were then due and payable, or which have since become due and payable, by the defendant (*owner*) to the defendant (*contractor*).

The plaintiff claims to have it declared that he is entitled to a charge *pro rata* with all other lien-holders who shall have given notice of their liens under section 11 of *The Mechanics' Lien Act* upon all moneys on the day of (*date of notice*) due and payable, or which have since that day become due and payable, by the defendant (*owner*) to the defendant (*contractor*).

That the amount for which the plaintiff is so entitled to a charge may be ascertained under the order and direction of the Court, and that the defendant (*owner*) may be ordered to pay the same to the plaintiff.

(a) This and the three following forms are not intended as complete forms, but merely as additional clauses to a statement of claim claiming a lien. Where the plaintiff's sole claim is the relief referred to in these four forms the preliminary part of the claim can be readily adapted from the preceding forms.

Appendix.

14.—CLAIM OF CHARGE ON TEN PER CENT. OF PRICE IN RESPECT OF THIRTY DAYS' WAGES. (*a*)

Form of claim of charge on 10 % of price in respect of wages lien.

The plaintiff is also entitled to a charge upon ten *per centum* of the price to be paid by the defendant (*owner*) to the defendant (*naming contractor under whom plaintiff claims*) for wages for thirty days (*or any less period*) in priority to all other liens, and in priority to any claims by the defendant (*owner*) against the defendant (*contractor*) for, or in consequence of, the failure of the latter to complete his contract with the defendant (*owner*).

15.—CLAIM BY LIEN-HOLDER FOR WAGES, TO LIEN ON PROPERTY OF MARRIED WOMAN. (*b*)

Form of claim to charge on married woman's estate in respect of wages' lien.

Under the provisions of the said *The Mechanics' Lien Act* the plaintiff, by virtue of being employed as aforesaid by the defendant (*husband*) is entitled to a lien upon the estate and interest of the defendant (*wife*) in the said lands for $, being thirty days' (*or less period*) wages due to him under his said contract with the said defendant (*husband*).

16.—CLAIM AGAINST PRIOR MORTGAGEE. (*c*)

Form of claim against prior mortgagee.

That prior to the commencement of the said work [*or* the delivery of the materials or machinery aforesaid] by indenture bearing date the day of the defendant (*owner, or other mortgagor*) did grant and mortgage the lands and premises aforesaid unto the defendant (*mortgagee*) to

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(*a*) See *section* 9, s.s. 3; and see note *a* to Form 13.

(*b*) See section 6, s.s. 2. Where this lien or charge is claimed it is necessary to show that the lien has been duly registered as required by section 20: and see note *a* to Form 13.

(*c*) See note *a* to Form 13.

secure the payment of the sum of $, and interest at the rate and at the days and times therein mentioned. Appendix.

By reason of the construction, alteration or repair of the building [*or* the erection or placing of the materials or machinery] upon the lands aforesaid the selling value of the said lands has been increased by the sum of $, and under the provisions of *The Mechanics' Lien Act* the plaintiff and other lien-holders of the same class are entitled to a lien upon the said lands for the amount due to them to the extent by which the selling value thereof has been so increased.

The Plaintiff claims :

1. That the amount by which the selling value of the said lands has been increased by the work done and materials furnished by the plaintiff and other lien-holders (if any) of the same class entitled to the benefit of this action may be ascertained under the order and direction of this Honourable Court.

2. That the defendant (*mortgagee*) may be ordered to pay into Court, to the credit of this action, the amount which shall be found due to the plaintiff and other lien-holders of the same class entitled to the benefit of this action in respect of their liens, or so much thereof as shall not exceed the amount by which the selling value of the said lands has been increased by the construction [alteration *or* repair] of the building [*or* the erection or placing of the materials *or* machinery] upon the said lands as aforesaid, and that the same when paid into Court may be paid out to the plaintiff and such other lien-holders of the same class as are entitled to share therein, subject to the payment of the plaintiff's costs.

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3. That in default of the defendant (*mortgagee*) making such payment, the said land may be sold freed from the said mortgage, and that the increased price which may be realized from such sale may be ascertained, and that the same may be ordered to be applied in payment of the liens of the plaintiff and other lien-holders of the same class entitled to the benefit of this action, subject to the payment of the plaintiff's costs.

17.—FORM OF INTERLOCUTORY *EX PARTE* INJUNCTION RESTRAINING THE REMOVAL OF BUILDINGS OR MACHINERY, ETC., UNDER SECTION 15.

(*Formal part of order as usual.*)

Form of interlocutory injunction restraining removal of buildings, etc.

And the plaintiff [in person *or* by his counsel] undertaking to abide by any order this Court may make as to damages in case this Court shall hereafter be of opinion that the defendant [*or* defendants, or any or either of them] shall have sustained any by reason of this order which the plaintiff ought to pay.

This Court doth order that the defendant, his [*or* the defendants, their] servants, workmen and agents be and they are hereby restrained until *the day of next, and until any motion which may on that day be made to continue this injunction shall have been disposed of,* from moving from the premises known as and being (*describe lands subject to lien*) any of the buildings, erections, material or machinery now standing, lying or being thereon. (*a*)

(*a*) Where the injunction is subsequently continued to the trial the order may be in a similar form to the above, substituting for the words between the * * the words "the trial or other final disposition of this action."

18.—FORM OF INJUNCTION RESTRAINING REMOVAL OF BUILDINGS OR MACHINERY, ETC. (a)

(*Formal parts of order, or judgment, as usual.*)

Form of injunction granted at trial, restraining removal of buildings, etc.

The Court doth order and adjudge that the defendant, his [*or* defendants, their] servants, workmen and agents, be, and they are hereby, restrained from removing from off the premises known as and being (*describe lands subject to lien*) any of the buildings, erections, material or machinery now standing, lying or being thereon until the liens of the plaintiff and other lien-holders of the same class entitled to the benefit of this action upon the said lands shall have been satisfied.

19.—FORM OF ORDER VACATING LIEN.

(*Title, style of cause or matter.*)

Form of order vacating lien.

Upon the application of (*owner*) in presence of the solicitor for (*lien-holder*), and upon hearing read (*affidavits and other papers upon which application founded*) it is ordered that the claim of (*name of lien-holder*) to a lien upon the estate or interest of (*name of owner*) in the following lands, viz. : (*description of lands as in registered claim*), in respect of the following work [*or* materials], that is to say, (*describe it as in the registered claim*) done [*or* furnished] for (*name of person for whom work done or materials furnished as in registered claim*) on or before the day of , and in respect of which the sum of $ was claimed by the said (*lien-holder* as due [*or* to become due] and which said claim was registered in the Registry Office of on the day of at o'clock as No. , be and the same is hereby vacated and discharged.

(*a*) This form is only suitable to be inserted in a judgment. For form of an interlocutory injunction granted pending the action see Form No. 17.

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20.—SUMMONS TO ENFORCE MECHANICS' LIEN IN COUNTY OR DIVISION COURT.

In the [County *or* Division Court] of the County of .

In the matter of *The Mechanics' Lien Act*, and in the matter of the mechanics' lien of A. B. upon the *(give short description of land sufficient for registration)*.

Form of summons to enforce lien in C. C. or D. C.

Upon the application of A. B., of *(residence and description)*, and upon reading the affidavits and papers filed, let C. D., of *(naming owner, or owners, and other persons interested in the land whose interest is sought to be sold for the satisfaction of the applicant's lien)* attend before me at my chambers at , on , the day of next, at o'clock in the noon, or so soon thereafter as the motion can be heard, to show cause why they should not pay the said A. B. the sum of $, being the amount of his said mechanics' lien upon the above mentioned lands within such time as I may appoint, and why, in default of such payment being made, the said lands [*or* the interest of the said C. D. in the said lands] should not be sold for the satisfaction of the lien of the said A. B., and why all necessary inquiries should not be made, accounts taken, and proceedings had before me as may seem just and necessary for the purpose of enforcing the lien of the said applicant; and let *(naming other persons having claims)* attend and prove their claims before me at the time and place aforesaid; and in default of their so doing their claims will be barred.

21.—ORDER FOR PAYMENT OF LIEN, AND IN DEFAULT FOR SALE, UPON SUMMARY APPLICATION IN A COUNTY OR DIVISION COURT.

(Heading as in last form).

Form of order for sale upon

Upon the application of the above named A. B., in presence of C. D., E. F., G. H., I. J. [*or* no one appearing for I. J.,

summary application in C. C. or D. C.

although duly notified], and upon reading the summons granted in this matter and the affidavits and papers filed.

And having taken an account of the amount due to the said A. B., E. F., G. H., in respect of their mechanics' liens upon the lands and premises [*or* upon the interest of the said C. D. *and others, if any*, in the lands and premises] above mentioned I do find that there is due to A. B. $, and $ for his costs, and to E. F. $, and $ for his costs, and to G. H. $, and $ for his costs; and I do order that upon the said C. D. (*and others, if any, whose interests in the land are liable to be sold*) paying the said sums so found due to the said [*or* into Court in this matter to the credit of the said] A. B., E. F., G. H., respectively, on or before the day of (*one calendar month from date of order*) (*a*) that the said liens of the said A. B., E. F. and G. H. be discharged. But in default of such payment being made as aforesaid, I do order that the interest of C. D. (*and others if any*) in the above mentioned lands be sold under my direction, and that the purchase money be paid into Court to the credit of this matter and be applied and paid out in or towards satisfaction of the said claims of the said A. B., E. F. and G. H., with subsequent interest and subsequent costs, to be ascertained by the Clerk of this Court, and that the residue of the said purchase money (if any) be paid to the said (*naming the person or persons entitled*). [And I. J. not having appeared before me, or proved any subsisting lien or charge upon the said land, I do find and declare that he is not entitled to any lien upon the said land.]

(*a*) A further order should be made after the lapse of the month, either absolutely discharging the lien, if payment shall have been made, or directing the sale, if payment shall not have been made: see *The Division Court Act*, s. 304.

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22.—FORM OF JUDGMENT IN ACTION BY CONTRACTOR.

IN THE HIGH COURT OF JUSTICE,

——— Division.

(*Name of Judge.*)

WEDNESDAY, the day of 18 .

Between G. F., Plaintiff,

and

The W. H. Company (*Limited*), Defendants.

Form of judgment in action by contractor.

This action coming on to be heard this day, on motion for judgment, in the presence of counsel for the plaintiff and defendants, [*or* no one appearing for the defendants, although duly notified as by admission of service appears,] upon opening of the matter, and upon hearing read the pleadings, and upon hearing what was alleged by counsel aforesaid,

1. This Court doth declare that the plaintiff and all other lien-holders (if any) of the same class, who shall have filed or registered their claims within 30 days from the commencement of this action, have a lien upon the estate and interest of the defendants in the lands and premises in the pleadings mentioned under "*The Mechanics' Lien Act,*" for so much of the value of the materials provided, and work done, and machinery placed by them respectively upon such lands and premises as remains justly due from the defendants to the said plaintiff, and such other lien-holders, if any, of the same class, and doth order and adjudge the same accordingly.

2. And this Court doth further order and adjudge that it be referred to the Master of the Supreme Court of Judicature at , to inquire and state whether any person or persons, and who other than the plaintiff, except prior mortgagees (if

any), has or have any lien, charge or incumbrance upon the estate and interest of the defendants in the said lands and premises, and in case the said Master shall find that any person or persons other than the said plaintiff (except prior mortgagees, if any) has or have any such lien, charge or incumbrance, then he is to cause such person or persons to be made party defendants to this action in his office, (*a*) and is to proceed to take an account of the amount due to the said plaintiff, and such other incumbrancer or incumbrancers (if any) for principal and interest, and to tax to them their costs of this action, including the costs (if any) of the plaintiff, and of any other lien-holders of the same class registering their liens (*b*) and settle their priorities.

3. And upon the defendants, (*i.e. the owners*,) paying the amounts which the said Master shall find to be due and payable by them to the plaintiff, and such other incumbrancer or incumbrancers, if any, (at such time and in such manner

(*a*) This form of judgment has been heretofore in use, but for the reasons given, *ante*, p. 92, it would seem that all incumbrancers, other than lien-holders of the same class as the plaintiff himself, should be made original defendants in the action. Assuming the action to be so constituted, then this paragraph should be framed as follows:—2. "And this Court doth further order and adjudge that it be referred to the Master of the Supreme Court of Judicature, at , to inquire and state whether there is, or are, any other person or persons, lien-holders of the same class as the plaintiff, and entitled to the benefit of this judgment, and in case he shall find there is, or are, any such person or persons, he is to cause such person or persons to be made party defendants in this action, in his office, and is to proceed to take an account of the amount due to the plaintiff, and such other lien-holders, if any, of the same class, [and also to the defendants entitled to incumbrances upon the said lands, as in the pleadings mentioned] for principal and interest, and tax to them their costs of this action, including the costs, if any, of the plaintiff, and of other lien-holders of the same class registering their liens, and settle their priorities."

(*b*) See section 30, s.s. 5.

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as the said Master shall appoint), within one month (*a*) after the said Master shall have made his report; this Court doth order and adjudge that the said plaintiff, and such other incumbrancer or incumbrancers (if any) do release and discharge their said liens, or convey and assign the said premises free and clear of all incumbrances done by them, and deliver up all deeds and documents in their respective possession or power relating thereto upon oath to the said defendants, or to whom they shall appoint, or enter up satisfaction upon the rolls of their judgments, as the case may require.

4. But in default of the said defendants making such payments by the time aforesaid, this Court doth order and adjudge that the estate and interest of the said defendants in the said premises be sold, with the approbation of the said Master, and the purchasers are to pay their purchase money into Court to the credit of this action, and all proper parties are to join in the conveyances as the said Master shall direct.

5. And this Court doth further order and adjudge that the purchase money, when so paid in, shall be applied first in payment to the said plaintiff of his costs of this action; second, in payment to the plaintiff and such other incumbrancer or incumbrancers (if any) of the amount the said Master shall find due and payable to them by the said defendants (*owners*) for principal money and interest and costs (other than the costs of the plaintiff, as aforesaid), according to their priorities, and the residue of the purchase money, if any, is to be paid to the said defendants (*owners*).

6. But in the event of such purchase money being insufficient to pay the claim of the plaintiff, this Court doth order and adjudge that the defendants do pay to the plaintiff the

(*a*) See section 30, s.s. 3, note *c*, *ante*, p. 93.

amount remaining due to him forthwith after service upon him of this judgment and the Master's certificate of such deficiency. (*a*)

23.—FORM OF JUDGMENT IN ACTION BY SUB-CONTRACTOR. (*b*)

(*Formal parts as ante, No.* 22.)

Form of judgment in action by sub-contractor.

1. This Court doth declare that the plaintiffs and all other lien-holders (if any) of the same class entitled to the benefit of this judgment are entitled to a lien and charge upon the estate and interest of the defendant (*the owner*) in the lands and premises in the plaintiffs' statement of claim mentioned, and upon the buildings and erections upon the same, by virtue of "*The Mechanics' Lien Act*," for so much of the price of the work done upon, or materials furnished, or provided, by the plaintiffs, and such other lien-holders of the same class (if any) entitled to the benefit of this judgment in and about the buildings as aforesaid erected upon the said lands as remains justly due to the said plaintiffs, and such other lien-holders (if any) of the same class, entitled to the benefit of this judgment, to the extent of the whole or such part of the amount, if anything, due by the defendant (*the owner*) to the defendant (*the contractor*) upon his contract in said pleadings mentioned, as the plaintiff, and such other lien-holders (if any) of the same class, entitled to the benefit of this judgment, may be found entitled to, which amount is to be ascertained as hereinafter directed, and doth order and adjudge the same accordingly.

(*a*) Where other claims in respect of mechanics' liens are proved, the lien-holders are entitled to have execution against their primary debtor, (section 30, s.s. 6) but a special application to the Court on petition or motion seems necessary to obtain this relief.

(*b*) See *Hocenden* v. *Ellison*, 24 Gr. 448.

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2. And this Court doth further order and adjudge that it be referred to the Master of the Supreme Court of Judicature, at , to take the following accounts:—1st. An account of the amount due from the said defendant (*the owner*) to the defendant (*the contractor*) in the pleadings mentioned, in respect of all work done upon, and materials provided for the erection of the buildings upon the lands in the pleadings mentioned; and in the event of the said Master finding that there is any sum still due by the said defendant (*the owner*) to the said defendant (*the contractor*), [or that there was any sum remaining due from the said defendant (*the owner*) to the said defendant (*the contractor*) after receiving notice in writing of the plaintiffs' said lien,] then the said Master is to take the following further account. 2nd. An account of the amount due from the said defendant (*the contractor*) to the plaintiffs and all other lien-holders (if any) of the same class, entitled to the benefit of this judgment, in respect of all work done and materials provided by the plaintiffs, and such other lien-holders (if any) entitled to the benefit of this judgment, for the said building.

3. And in the like event this Court doth further order and adjudge that the said Master do inquire and state whether any person or persons, and who other than the said plaintiffs, (other than prior mortgagees) has or have any lien, charge, or incumbrance upon the said lands and erections thereon, under "*The Mechanics' Lien Act*," or otherwise; and in case the said Master shall find that any such person or persons, has or have any such lien, charge, or incumbrance, he is to cause them to be made parties to this action and served with process according to the practice of this Court, (*a*) and is to proceed to take an account of what was due to the said plain-

(*a*) This form of judgment has been heretofore in use, but for the reasons given, *ante*, p. 92, it would seem that all incumbrancers, other than lien-holders, of the same class as the plaintiff, should be made original defendants in the action, (see preceding form, note *a*).

tiffs, upon and in respect of their said lien and to such other incumbrancers (if any) and to settle their priorities.

4. And this Court doth reserve further directions and the question of costs until after the said Master shall have made his report.

24.—FORM OF JUDGMENT ON FURTHER DIRECTIONS IN ACTION BY SUB-CONTRACTOR.

(*Formal parts as in Form No. 22*)

Form of judgment on further directions in action by sub-contractor.

1. This Court doth order and adjudge that the defendants, A. B. and C. D., ("*owners*"), do forthwith pay into Court, to the credit of this action, the sum of $396.40 less their costs of this action, which have been taxed and certified at the sum of $84.80. (*a*)

2. And this Court doth further order and adjudge that the said moneys so to be paid into Court, be applied and paid out as follows:—1. In payment to the plaintiff of his costs of this action, which costs have been taxed and certified at the sum of $. 2. To the defendants, J. B. and G. F., (*lien-holders*), their costs of this action, which costs have been taxed and certified at the sum of $.

3. And this Court doth further order and adjudge that out of the balance remaining in Court to the credit of this action, after the payments aforesaid, the sum of $ be paid out to the said plaintiff, the sum of $ to the said defendants, J. B. and G. F., and the sum of $ to the said defendants, J. P. & S. S.

(*a*) To this form might properly be added a direction for sale in the event of the defendants making default in payment as provided by paragraph 1; and for the application of the proceeds in payment of the claims of the parties entitled, with subsequent interest and subsequent costs.

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4. And this Court doth further order and adjudge that the lands and premises, and the erections thereon, of the said defendants, A. B. and C. D., (*owners*), in the pleadings in this action mentioned, be, and they are, hereby declared to be freed and clear of all liens, charges and incumbrances created by the registration of the liens registered by the several parties to this action.

5. And this Court doth further order and adjudge that the said defendants, W. C. and R. C., (*contractors by whom the plaintiff employed*), do forthwith pay to the plaintiff the sum of $592.20, with interest thereon from the 6th day of March inst., and to the defendants, J. B. and G. F., the sum of $313.36, with interest thereon from the 6th day of March inst., and to the defendants, J. P. and S. S., the sum of $16.53, with interest thereon from the said 6th day of March inst., the said last mentioned sums being the balances remaining due to the said parties respectively in respect of their mechanics' liens after deducting the amounts hereinbefore directed to be paid to them. (*a*)

25.—FORM OF JUDGMENT WHERE RELIEF GRANTED AGAINST A MORTGAGEE UNDER SECTION 5. (*b*)

(*Formal parts as in No.* 22.)

Form of judgment where relief claimed against prior mortgagee under s. 5.

1. This Court doth declare that the plaintiffs and other lien-holders of the same class (if any) entitled to the benefit of this judgment, have a lien upon the lands and premises in the statement of claim mentioned under "*The Mechanics' Lien Act*," for so much of the price of the work done and

(*a*) The order for payment of the deficiency is made against the primary debtor of the lien-holders.

(*b*) See *Cowan* v. *Toole*, D. B. 37, fo. 5; *Downer* v. *Mix*, D. B. 31, fo. 392; *Hall* v. *Pilz*, 2nd June, 1886.

materials furnished and expended by them in the construction and erection [*or* repairs] of the buildings upon the said lands in the said statement of claim mentioned, as remains justly due from the defendant (*the owner*) to the said plaintiffs, and such other lien-holders (if any), and doth order and adjudge the same accordingly.

2. And this Court doth further order and adjudge that it be referred to the Master of the Supreme Court of Judicature at , to inquire and state whether any person or persons, and who other than the said plaintiffs, (except prior mortgagees, if any,) has or have any valid lien, charge, or incumbrance upon the said land and premises, and in case he shall find that any such person or persons has or have any such lien, charge, or incumbrance, then he is to cause such person or persons to be served with process according to the practice of this Court, and it is to take an account of the amount due the said plaintiffs, and such other incumbrancer or incumbrancers (if any) for principal and interest, and to tax to them their costs of this action, including the costs, if any, of plaintiff and such other lien-holders of the same class, of registering their liens, and settle their priorities.

3. And upon the said defendant, (*the owner*) paying the amounts which the said Master shall find to be due to said plaintiffs and such other incumbrancer or incumbrancers as aforesaid (if any) within one month after said Master shall have made his report at such time and in such manner as the said Master shall direct ; this Court doth order and adjudge that the said plaintiffs and such other incumbrancer or incumbrancers (if any) do release and discharge their said liens, or convey and assign the said lands, as the case may be, to said defendant (*the owner*) or to whom he may appoint.

4. And this Court doth order and adjudge that the defendant (*primary debtor*) do forthwith, after the making of the

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Master's report, pay to the plaintiff what shall be found due to him for principal, interest, and costs. (*a*)

5. And in the event of said defendant (*the owner*) paying off said plaintiff and such other incumbrancers (if any), this Court doth order and adjudge that said defendant (*the owner*) do pay to said defendant (*the mortgagee*) his costs of this action forthwith after taxation thereof.

6. But in default of the said defendant (*owner*) making such payments, by the time and in the manner aforesaid, this Court doth order and adjudge that the said lands and premises, and the other land comprised in the mortgage of defendant (*mortgagee*), be sold, (*b*) with the approbation of said Master, and the purchasers are to pay their purchase money into Court to the credit of this action, and all proper parties are to join in the conveyances to the purchasers as the said Master shall direct ; and in the event of the proceeds being sufficient to satisfy the amount found due said defendant (*the mortgagee*) upon his mortgage and his costs of action to be ascertained and taxed by said Master, and also the amounts found due to the said plaintiffs and such other lien-holders of the same class, and their costs, then the said proceeds are to be so applied and paid out of Court accordingly.

7. But in the event of the said proceeds not being sufficient to satisfy the claims referred to in the last preceding paragraph, then this Court doth further order and adjudge that the said Master do inquire and state by what amount the selling value of the said lands and premises has been actually increased by the improvement of the same caused by the work done by the plaintiff and other lien-holders of the

(*a*) It is doubtful whether this order is proper : see *ante*, p. 96.

(*b*) The sale may be by public auction, private contract, or tender, as the Master thinks best. The Master is to settle the conveyances to the purchasers in case the parties differ : C. R. 61, 89.

same class (if any) thereon, and by materials placed by the said plaintiff and such other lien-holders thereon, and in respect of which they are entitled to a lien or liens under the said "*The Mechanics' Lien Act.*"

8. And this Court doth declare that the plaintiff and other lien-holders of the same class, entitled to the benefit of this judgment, are entitled to a charge for the amounts which may be found due to them respectively, in priority to the defendant (*mortgagee*), upon so much of the proceeds of the said sale as the said Master shall find to be the amount by which the selling value of the lands has been increased by the buildings being erected thereon, and that such portion of the said purchase money be applied: 1st, in payment of the plaintiff's costs of this action; 2nd, in payment of the claims of the plaintiff, and all other incumbrancers, including the costs of such other incumbrancers which are to be added to their respective claims, according to their priorities, and the residue of the said purchase money, if any, is to be paid out to the party or parties the said Master shall find to be entitled thereto.

9. And this Court doth further order and adjudge that the said defendant (*the mortgagee*) may, if he so elect, pay to the said plaintiffs and the other lien-holders (in the proportion in which they are entitled) the amount by which the selling value of said lands and premises has been increased by the improvement of the same, caused by the work done and materials placed thereon by the plaintiffs and the other lien-holders of the same class (if any), and in case said defendant (*the mortgagee*) so elect, the said Master is to ascertain without sale by what amount the selling value of said lands has been increased by the improvement thereof as aforesaid.

10. And upon the said defendant (*mortgagee*) paying into Court, to the credit of this action, within one month after

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the said Master shall have made his report, the amount which the said Master shall ascertain to be the amount by which the selling value of the said lands has been increased by the improvement thereof as aforesaid, or so much thereof as may be sufficient to satisfy the amounts which shall be found due to the plaintiff and other lien-holders of the same class for principal, interest, and costs, this Court doth order and adjudge that the plaintiff and such other lien-holders do release and discharge their said liens.

11. And this Court doth further order and adjudge that the amount which may be so paid into Court as last aforesaid be applied—1st, in payment of the plaintiff's costs of this action ; 2nd, in payment of the claims of the plaintiffs and other lien-holders (including the costs of such other lien-holders which are to be added to their claims) *pari passu*, and the residue thereof (if any) is to be repaid to the said defendant (*mortgagee*).

12. And this Court doth further order and adjudge that in the event of said defendant (*the mortgagee*) so electing to pay the amount by which the selling value of the said lands has been increased as aforesaid, that he be at liberty to add the sum which may be so paid by him as aforesaid to the amount of his mortgage debt, and proceed to recover the same in this action by foreclosure or sale of the mortgaged premises.

13. And this Court doth further order and adjudge that in the event of said defendant (*the mortgagee*) so electing as aforesaid, and failing to pay the amount found to be payable upon such election, by the said Master as aforesaid, the said premises in question be sold as hereinbefore directed, and the proceeds applied as already provided, except that said defendant (*the mortgagee*) is not to be entitled to any costs beyond what would have been incurred if he had not so elected.

26.—FORM OF JUDGMENT IN ACTION BY CONTRACTOR WHERE OWNER DENIES THAT ANYTHING IS DUE TO PLAINTIFF. (*a*)

(*Formal parts as in preceding form No. 22.*)

Form of judgment in action by contractor where owner denies anything to be due.

1. This Court doth order and adjudge that it be referred to the Master of the Supreme Court of Judicature, at , to inquire and state whether anything is due from the defendants to the plaintiffs, in respect of their alleged mechanics' lien in the pleadings mentioned.

2. And in case the said Master shall find that there is anything due to the plaintiffs from the said defendants, this Court doth further order and adjudge that the said Master do inquire and state whether any person or persons, and who, other than the plaintiffs, except prior mortgagees (if any) has or have any lien, charge, or incumbrance upon the estate and interest of the defendants in the said lands and premises in the plaintiff's statement of claim mentioned, and in case the said Master shall find that any person or persons other than the said plaintiff (except prior mortgagees) has or have any such lien, charge, or incumbrance, then he is to cause such person or persons to be made parties to this action and served with process according to the practice of this Court, and is to proceed to take an account of the amount due to the said plaintiffs, and to such other incumbrancer or incumbrancers (if any) for principal and interest, and to tax to them their costs of this action, and the plaintiff's costs of registering his said lien, and settle their priorities.

3. And upon the said defendants paying the amounts which the said Master shall find to be due and payable by them to the plaintiff, and such other incumbrancer or incumbrancers (if any), within one month after the said Master shall have made his report, at such time and in such manner as the said

(*a*) See *Boult* v. *Wellington Hotel Company*, D. B. 23, fo. 29.

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Master shall appoint ; this Court doth order and adjudge that the said plaintiffs, and such other incumbrancer or incumbrancers (if any), do release and discharge their said liens, or convey and assign the said premises free and clear of all incumbrances done by them, and deliver up all deeds and documents in their respective possession or power relating thereto upon oath to the said defendants, or to whom they shall appoint, or enter up satisfaction upon the rolls of their judgment as the case may require.

4. But in default of the said defendants making such payments by the time aforesaid, this Court doth order and adjudge that the estate and interest of the said defendants in the said premises be sold with the approbation of the said Master, and the purchasers are to pay their purchase money into the Court to the credit of this action ; and all proper parties are to join in the conveyances to the purchasers as the said Master shall direct.

6. And this Court doth further order and adjudge that the purchase money, when so paid into Court, shall be applied :— 1st. In payment to the plaintiffs of their said costs. 2nd. In payment to the plaintiffs, and such other incumbrancer or incumbrancers (if any) of the amounts which the said Master shall find due and payable to them by the said defendants for principal money, interest, and costs (other than the costs of the plaintiff as aforesaid), according to their priorities, and the residue of the said purchase money, if any, is to be paid to the said defendants.

6. And, in the event of such purchase money being insufficient to pay the claim (if any) of the said plaintiffs, this Court doth order and adjudge that the said defendants do pay to the plaintiffs the amount remaining due to them forthwith after service upon them of this judgment, and the Master's certificate of such deficiency.

7. But in the event of the said Master finding that there is nothing due from the said defendants to the plaintiffs in respect of their alleged mechanics' lien in the pleadings mentioned, this Court doth reserve further directions and the question of costs until after the said Master shall have made his report.

27.—FORM OF JUDGMENT IN ACTION BY SUB-CONTRACTOR WHERE OWNER ADMITS A SUM DUE TO CONTRACTOR. (*a*)

(*Formal parts as in preceding form No.* 22.)

Form of judgment in action by sub-contractor where owner admits a sum to be due.

1. This Court doth declare that the plaintiffs, and the other lien-holders of the same class, if any, entitled to the benefit of this judgment, are entitled to a lien and charge upon the estate and interest of the defendant (*owner*) in the lands and premises in the plaintiff's statement of claim mentioned, and upon the buildings and erections upon the same by virtue of "*The Mechanics' Lien Act*," for so much of the price of the work done upon or materials furnished or provided by the plaintiffs, and such other lien-holders, if any, in and about the buildings erected upon the said lands as remains justly due to the said plaintiffs, and such other lien-holders, if any, to the extent of the whole or such part of the amount due by the defendant (*owner*) to the defendant (*contractor*) upon his contract in said pleadings mentioned as the plaintiffs, and such other lien-holders, if any, may be found entitled to, which amount is to be ascertained as hereinafter directed, and doth order and adjudge the same accordingly.

2. And this Court doth further order and adjudge that it be referred to the Master of the Supreme Court of Judicature for Ontario, at , to take an account of the amount due from the said defendant (*owner*) to the defendant

(*a*) See *Lindop* v. *Martin*, J. B. 3, fo. 414; and see J. B. 4, fo. 143.

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(*contractor*) in the pleadings mentioned in respect of all work done upon, and material provided for, the erection of the buildings upon the lands in the pleadings mentioned.

3. And this Court doth further order and adjudge that the said Master do inquire and state whether any person or persons, and who other than the plaintiffs (other than prior mortgagees) has or have any lien, charge or incumbrance upon the said lands and erections thereon, under "*The Mechanics' Lien Act*," or otherwise; and, in case the said Master shall find that any such person or persons has or have any such lien, charge, or incumbrance, he is to cause them to be made parties to this action, and served with process according to the practice of this Court, and is to proceed to take an account of what is due to the said plaintiffs upon and in respect of their said lien, and to such other incumbrancers, if any, and to settle their priorities.

4. And this Court doth further order and adjudge that the said defendant (*owner*) be at liberty forthwith to pay into Court to the credit of this action, subject to the further order of this Court, the balance of the sum of $688, being the amount admitted to be due by him to the defendant (*contractor*), after deducting from the said sum his costs of this action up to and inclusive of this judgment to be taxed, without prejudice to the right of the plaintiff, or any other lien-holder, to contend that a larger sum is due from the defendant (*owner*) to the said defendant (*contractor*).

5. This Court doth further order and adjudge that upon the said defendant paying into Court such balance as aforesaid, the lands in the pleadings mentioned be thereupon discharged from the lien of the said plaintiffs, and all other lien-holders, if any of the same class, to the extent of the said sum of $688.

6. And this Court doth reserve further directions, and the question of costs, except as aforesaid, until after the said Master shall have made his report.

28.—FORM OF NOTICE OF SALE OF CHATTELS TO BE PUBLISHED AND SERVED ON OWNER UNDER SECTION 32.

AUCTION SALE.

Form of notice of sale of chattels to satisfy lien, under s. 32.

Whereas (*name of person indebted*) is indebted to the undersigned in the name of $ for [work done and materials supplied in the alteration or improvement of one spring waggon], and three months have elapsed since the said sum ought to have been paid, and default has been made in payment thereof, notice is hereby given that on next, the day of , at (*place of sale*, e.g. the auction rooms of C. D., No. 6 King Street West, in the City of Toronto), the said (*describe chattel*) will be sold by (*name of auctioneer*), by public auction.

(*If the sale is to be subject to a reserved bid, or other special conditions, it should be so stated.*)

Date, etc.

(*Signature of lien-holder.*)

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